82-1460

No. 83-.....

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

BERNARD AVCOLLIE,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

JOHN D. JESSEP
KOSKOFF, KOSKOFF & BIEDER, P.C.
55 Chapel Street
Bridgeport, Connecticut 06604
(203) 336-4421

Counsel for Petitioner

QUESTIONS PRESENTED

1. When a criminal defendant claims that his indictment was returned by a grand jury selected in an unconstitutional manner, is the criminal defendant entitled to present testimony from the grand jurors who indicted him concerning the racial composition of the indicting grand jury and of previous grand juries upon which they served?

2. Does a jury charge instructing that every person is presumed to intend the natural and necessary consequences of his acts relieve the state of proving the element of intent or burden the defendant with disproving the presumed intent if it also instructs that a person's intention may be inferred from his conduct?

3. When the state introduces evidence of a criminal defendant's insanity during the state's rebuttal case and the jury is instructed that sanity is an element of the offense, can there be sufficient evidence to sustain a conviction when no evidence of sanity was ever introduced?

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

TABLE OF CASES AND AUTHORITIES

OPINIONS OF LOWER COURTS

Following the jury's verdict of guilty in petitioner's trial, the judge set aside the verdict and entered a judgment of acquittal ruling that the state had not sustained its burden of proof. The state appealed the trial judge's ruling to the Connecticut Supreme Court and the petitioner moved to dismiss the state's appeal on double jeopardy grounds. The Connecticut Supreme Court's opinion denying the petitioner's motion to dismiss is found in State v. Avcollie, 174 Conn. 100, 384 A.2d 315 (1977).

The Connecticut Supreme Court subsequently heard the state's appeal on the merits and reversed the trial judge's setting aside of the jury's guilty verdict and entry of judgment of acquittal, State v. Avcollie, 178 Conn.

450, 423 A.2d 118 (1979), cert. den. 444 U.S. 1015 (1980).

The case was remanded and petitioner was sentenced to an 18 year to life term of imprisonment whereupon petitioner appealed to the Connecticut Supreme Court. The Connecticut Supreme Court affirmed his conviction in State v. Avcollie, 188 Conn. 626, 453 A.2d 418 (1982) and on January 3, 1983 the Connecticut Supreme Court denied petitioner's Motion for Reargument.

JURISDICTION

The opinion of the Connecticut Supreme Court was rendered on December 14, 1982 and it denied reargument on January 3, 1983.

Jurisdiction to review this case is conferred on this Court by 28 U.S.C. §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. XIV

> ". . . No state shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Connecticut General Statute 53a-54a.

> (a) A person is guilty of murder when, with intent to cause the death of an other person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.
>
> (b) Evidence that the defendant suffered from a mental disease,

> mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person.
>
> (c) Murder is punishable as a class A felony unless it is a capital felony and the death penalty is imposed as provided by section 53a-54a.

18 U.S.C. §243

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

STATEMENT OF THE CASE

Petitioner's wife was found dead in the family swimming pool on October 30, 1975. On November 20, 1975 the state requested that a grand jury be

impanelled the next day; that the grand jury proceedings be held in secret and that the petitioner be excluded from the grand jury room thereby precluding him from questioning the witnesses appearing before the grand jury, in contravention of the usual Connecticut practice, Cobbs v. Robinson, 528 F.2d 1331 (2d Cir. 1975). The court granted this request.

A sheriff impanelled a grand jury by telephoning people who had appeared on prior grand juries rather than following the usual Connecticut practice of serving a summons on persons whose names had been obtained from a computer. The resultant grand jury did not have an attorney as foreperson, also in contravention of usual Connecticut practice, id. On November 21, 1975 petitioner was indicted by this grand

jury for the intentional murder of his wife.

On May 12, 1976 petitioner filed a Motion to Dismiss the indictment (Appendix at 1a), claiming inter alia that the indictment was invalid because it was returned by a grand jury selected in an unconstitutional manner thereby denying petitioner his rights of due process and equal protection under the Connecticut and United States Constitutions. In support thereof petitioner subpoenaed the sheriff who impanelled the grand jury and the 18 grand jurors as well as the two alternates.

The state moved to quash the subpoenaes and the court granted the motion in spite of petitioner's representations that he would not seek to pry into the secrecy of the grand jury's

deliberations. At this hearing petitioner and the trial court agreed that there were no "non-caucasions" among petitioner's grand jurors. The court eventually denied petitioner's Motion to Dismiss in an opinion dated July 27, 1976 (Appendix at 5a); this decision was affirmed by the Connecticut Supreme Court on December 14, 1982 (Appendix at 28a).

At petitioner's trial during the state's rebuttal evidence, the state introduced evidence that the alleged victim, petitioner's wife, thought that petitioner was insane. Petitioner did not object to this evidence nor to the trial judge's instruction that sanity was an element of the case which the state was burdened with proving beyond a reasonable doubt.

Another part of the trial judge's jury instructions as part of the charge on the element of "intent", instructed the jury that ". . . Every person is presumed to intend the natural and necessary consequences of his acts." Petitioner did not object to this instruction when it was given. He did voice his objection by way of a Motion to Set Aside Entry of Verdict, Motion for Acquittal and Motion in Arrest of Judgment, filed January 28, 1980 (Appendix at 16a). The issue was heard and decided on appeal by the Connecticut Supreme Court on December 14, 1982.

The jury returned a verdict of guilty after disclosing a deadlock of 11-1 in favor of conviction and being given an Allen-type charge.

Subsequently the trial court set aside the verdict of guilty and entered a judgment of acquittal.

PRIOR HEARINGS ON THE ISSUES RAISED HEREIN

1. The issue of the quashing of the subpoenaes issued to members of the indicting grand jury was heard in the trial court on June 3, 1976 and heard in the Connecticut Supreme Court in State v. Avcollie, 188 Conn. 626, 453 A.2d 418 (1982).

2. The issue of the trial judge's instruction that "[e]very person is presumed to intend the natural and necessary consequences of his acts" was first raised via motion filed January 28, 1980 following the Connecticut Supreme Court's decision in State v. Avcollie, 178 Conn. 450, 423 A.2d 118 (1979) that there were sufficient facts to support a guilty verdict. This issue was decided by the Connecticut Supreme Court in

State v. Avcollie, 188 Conn. 626, 453 A.2d 418 (1982).

3. The issue of the proof and jury instruction on the element of sanity was first raised by a brief filed after remand on February 28, 1980 as part of Petitioner's Motion to Set Aside Entry of Verdict, Motion for Acquittal and Motion in Arrest of Judgment, following the Connecticut Supreme Court's decision in State v. Avcollie, 178 Conn. 450, 423 A.2d 118 (1979); it was not raised earlier in the trial court inasmuch as the trial court granted the petitioner's motion to set aside the guilty verdict based upon insufficient evidence. The issue of proof and jury instruction were argued before the Connecticut Supreme Court but the Court refused to address the

jury instruction issue because the petitioner made no objection to it at trial. The Connecticut Supreme Court failed to address the sufficiency of evidence argument, State v. Avcollie, 188 Conn. 626, 453 A.2d 418 (1982).

REASON FOR GRANTING THE WRIT

I. WHEN A CRIMINAL DEFENDANT CLAIMS THAT HIS INDICTMENT WAS RETURNED BY A GRAND JURY SELECTED IN AN UNCONSTITUTIONAL MANNER, THE CRIMINAL DEFENDANT IS ENTITLED TO PRESENT TESTIMONY FROM THE GRAND JURORS WHO INDICTED HIM CONCERNING THE RACIAL COMPOSITION OF THE INDICTING GRAND JURY AND PREVIOUS GRAND JURIES UPON WHICH THEY SERVED.

Petitioner had moved to dismiss the indictment returned against him on the grounds that his indictment was

> invalid because it was returned by a Grand Jury selected in an unconstitutional manner, thereby denying to the defendant due process of law under the 5th and 14th Amendments to the United States Constitution and Article 1, Sec. 9 of the Connecticut Constitution, and also denying

> the defendant the equal protection of the laws under the 14th Amendment to the United States Constitution.

(Appendix at 2a).

In support of his motion he had subpoenaed the 18 grand jurors and the two alternates who sat on his grand jury; the State moved successfully to quash these subpoenaes.

Petitioner argued that quashing the subpoenaes would preclude petitioner from satisfying his burden of proving discrimination and improper selection. Petitioner assured the court that he would not inquire into the deliberations of the grand jurors but did wish to inquire regarding their previous service as grand jurors. He stated that from their presence in court it could be noted that there were no non-caucasians among the 18 members and 2 alternates.

The state argued that the petitioner had no possible complaint unless the petitioner himself was a member of the class whose systematic exclusion he complains of.

To demonstrate the systematic exclusion of a class from membership on grand jurors, it was incumbent on Mr. Avcollie to demonstrate 3 things:

1. That the procedure employed to select the grand jurors resulted in a substantial underrepresentation of a race or class which is singled out for different treatment under the laws as applied.

2. That this degree of underrepresentation, shown by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, has

existed for a significant period of time; and

3. That the selection procedure is susceptible to abuse.

Castanada v. Partida, 430 U.S. 482 (1977).

The fact that all of the grand jurors were caucasians would indicate that petitioner would be able to show that the sheriff's selection procedure had resulted in a grand jury composed exclusively of white persons. The state's argument to quash the subpoenaes contained the admission that these grand jurors had served the court without complaint for many years. This would make the grand jurors firsthand knowledgeable witnesses about the racial composition of the prior grand juries that they had served upon. While these were questions that petitioner might

have asked the sheriff who had summoned the prior grand juries, that sheriff had already testified and his testimony had been inaccurate in several respects regarding the last minute telephoning of the indicting grand jurors. Also the sheriff should not be expected to give information amounting to an admission of discrimination of grand juror membership when to do so might be tantamount to admission of a crime under 18 U.S.C. §243. Clearly inquiry of the grand jurors themselves about their prior grand jury experience would have brought more than one memory to bear on past practices without the biases of the sheriff.

Peters v. Kiff, 407 U.S. 493 (1972) and Taylor v. Louisiana, 419 U.S. 522 (1975) clearly demonstrate that, contrary to the state's argument,

one need not be a member of the class whose systematic exclusion he complains of to mount a successful challenge to the composition of his grand jury. Furthermore, in Rose v. Mitchell, 443 U.S. 545 (1975) 10 of the 11 indicting grand jurors testified regarding racial discrimination in grand juror selection. Finally, Coleman v. Alabama, 377 U.S. 129 (1964) dictates that a criminal defendant is entitled to his day in court on the issue of improper grand juror selection. Because the petitioner herein was improperly excluded from being present before the grand jury, State v. Avcollie, 188 Conn. 626, 633 453 A.2d 418 (1982) he was unable to see the grand jurors who indicted him and make a visual determination of whether Blacks, Hispanics, Women or any other classes of persons were excluded

therefrom. Therefore petitioner was left with only two categories of evidence from which he could show present and prior grand jury discrimination: the sheriff who impanelled the grand juries and the grand jurors themselves who had all, as previously noted, served the court without complaint for many years.

The Connecticut Supreme Court's ruling that defendant had not laid a sufficient "foundation" is belied by the petitioner's showing that the indicting grand jurors were all caucasions. That would indicate that petitioner had substantial evidence toward point one of the Castenada criteria. Showing that the sheriff had merely telephoned veteran grand jurors whom he knew personally from prior service and who might appear on less than 24 hours,

notice would tend to demonstrate that this "selection procedure was susceptible to abuse" Castenada, supra. The issue of prior history of underrepresentation would have been served by questioning the grand jurors themselves and from this inquiry the petitioner was precluded. It would therefore seem that a proper "foundation" entitling petitioner to inquire further had been laid by petitioner's demonstrating that the grand jury which indicted him was all white and that the sheriff had selected people whom he knew from prior grand jury service who would appear on less than 24 hours telephone notice.

A writ of certiorari should issue to the Connecticut Supreme Court because of the Connecticut Supreme Court's failure to adhere to the teachings of Coleman v. Alabama.

II. A JURY CHARGE INSTRUCTING THAT EVERY PERSON IS PRESUMED TO INTEND THE NATURAL AND NECESSARY CONSEQUENCES OF HIS ACTS RELIEVES THE STATE OF PROVING THE ELEMENT OF INTENT AND BURDENS THE DEFENDANT WITH DISPROVING INTENT EVEN IF IT ALSO INSTRUCTS THAT A PERSON'S INTENTION MAY BE INFERRED FROM HIS CONDUCT.

In its instructions to the jury on the element of intent, the trial court charged that:

> The third element which the state must prove is that the person causing the death of the person must have done so with the intent to cause the death. In other words, the state must prove beyond a reasonable doubt that the accused did strangle Wanda Avcollie, with intent to cause her death.
>
> Now, intent is a mental process. A person's intention may be inferred from his conduct. Every person is presumed to intend the natural and necessary consequences of his acts. It is often impossible and not necessary to prove criminal intent by direct evidence. Ordinarily, intent can be proved only by circumstantial evidence, as I have explained that term to you.

What a person's purpose or intention has been is necessarily very largely a matter of inference. A person may take the stand and testify directly as to what his or her purpose or intention was, and that testimony you may believe or not, according to whether or not it warrants belief. But no witness can be expected to come here and testify that he looked into another person's mind and saw therein a certain purpose or intention. The only way in which a jury can determine what a person's purpose or intention was at a given time, aside from the person's own testimony, is by determining what that person's conduct was and what the circumstances were surrounding that conduct, and from those infer what his purpose or intention was. To draw such an inference is not only the privilege but it is also the duty to you, the jury, provided, of course, the inference drawn is a reasonable one.

In this case, therefore, it will be part of your duty to draw all reasonable inferences from the conduct of the accused in the light of the surrounding circumstances as to what purpose or intention was in his mind at various times during the evening when the death of the victim occurred.

> In order for the accused to be found guilty of the charge of murder, you must find beyond a reasonable doubt that he had an intent to cause the death of Wanda Avcollie. If you do not find beyond a reasonable doubt that the accused had that intent, then he is not guilty of the murder of Wanda Avcollie.

(Appendix at 19a).

The phrase "[e]very person is presumed to intend the natural and necessary consequences of his acts" was condemned by this Court in Sandstrom v. Montana, 422 U.S. 510 (1979). Shortly thereafter, a jury charge identical to that quoted above from petitioner's trial was before this Court in Moye v. Connecticut, 444 U.S. 983 (1979). In Moye, this Court vacated the Connecticut Supreme Court's prior approval of this jury charge in State v. Moye, 177 Conn. 487, 418 A.2d 870 (1979) and remanded Moye to the Connecticut Supreme Court for consideration in light of Sandstrom.

Upon remand, the Connecticut Supreme Court set aside Moye's murder conviction and granted Moye a new trial, State v. Move, 179 Conn. 758, 409 A.2d 149 (1979).

Since setting aside the conviction on Move, the Connecticut Supreme Court has reverted to approving the very jury instruction which prompted this Court to vacate in Move v. Connecticut; see generally State v. Arroyo, 180 Conn. 171, 429 A.2d 457 (1980); State v. Perez, 181 Conn. 299, 435 A.2d 334 (1980); State v. Brokaw, 183 Conn. 29, _____ A.2d _____ (1981); State v. Mason, 186 Conn. 574, 442 A.2d 1335 (1982); State v. Avcollie, 188 Conn. 626, 453 A.2d 418 (1982). These decisions demonstrate that the Connecticut Supreme Court has retreated from the dictates of this Court in Sandstrom and

Moye, requiring that this Court grant a writ of certiorari.

III. **WHERE THE STATE INTRODUCES EVIDENCE OF THE DEFENDANT'S "INSANITY" DURING THE STATE'S REBUTTAL CASE, AND THE TRIAL COURT INSTRUCTS THE JURY THAT SANITY IS AN ELEMENT OF THE OFFENSE THAT MUST BE PROVEN BEYOND A REASONABLE DOUBT, CAN THERE BE SUFFICIENT EVIDENCE TO SUSTAIN DEFENDANT'S CONVICTION WHEN NO EVIDENCE OF SANITY WAS INTRODUCED?**

The defense offered no evidence of mental disturbance but the State elicited testimony from Elizabeth Ann Brown that on October 17, 1975 (two weeks before her death), Mr. Avcollie's wife

> said that she thought that Bernie was sick and needed help and what she was going to try and do is to get him to go away for a weekend. And she was going to try and talk to him about seeing a psychiatrist again. And I asked her if she really thought Bernie was sick and she said yes, that she did.

(Transcript at 1654). Later through the same witness the State elicited that Mrs. Avcollie ". . . wouldn't mind a confrontation with a psychiatrist because she was perfectly sane but she didn't think he was." (Transcript at 1685-86).

After the close of the evidence the trial court charged that sanity was an element of the offense.

> The second element which the state must prove is that at the time of the death of Wanda Avcollie, the person who is supposed to have caused her death was of sound mind, that is legally sane; and a person is of sound mind and legally sane and responsible for his crime and unlawful conduct if at the time of such conduct he does not as a result of mental disease or defect lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.
>
> This may sound a little bit unusual to you but I will explain it now.

The term "mental disease or defect" includes an abnormal condition of mind which substantially affects mental or emotional processes and substantially impairs behavior controls. "Behavior controls" include the processes and capacity of a person to regulate and control his conduct and actions.

For a person not to be responsible for his criminal action, there must be a causal relationship between the mental disease or defect that he has at the time of that conduct, if any is found in the criminal conduct, so that it can be found that were it not for the mental disease or defect that conduct would not have taken place.

Now, although it is true that the burden of proving an accused is of sound mind is upon the state, it is also true that because most men are of sound mind, the law presumes that an accused was of sound mind at the time the incident on which the charge is based unless there is some credible evidence tending to prove the contrary has been introduced. In this case, as I recall the evidence, no such evidence of unsound mind has been introduced. As I said earlier, your recollection of the evidence controls. So that the law presumes every person accused of a crime is of sound mind at the time the crime occurs.

(Transcript of July 18, 1977 at 34-35)

The state's introduction of evidence that Mr. Avcillie was not sane and the trial court's subsequent instruction that sanity must be proven beyond a reasonable doubt clearly made sanity an element to be decided by the jury.

The state during its case in chief in a criminal trial may rely upon the presumption of sanity, but, as soon as evidence indicating insanity comes into the case this presumption of sanity disappears and the state must thereupon undertake the burden of proving the defendant sane, State v. Davis, 158 Conn. 341, 260 A.2d 587 (1969). Removal of the presumption of sanity is not the only function of evidence of insanity; it also constitutes affirmative evidence for the consideration of the jury on the element of sanity. The evidence then undergoes evaluation by

both the trial judge and the jury; the judge considers to remove the presumption of sanity and the jury must evaluate it on the "element" of sanity. But if sanity is an element and the only evidence on that offered by the state element indicates insanity, how then can the state be said to have sustained its burden of proof on sanity when it has introduced no evidence whatsoever of sanity?

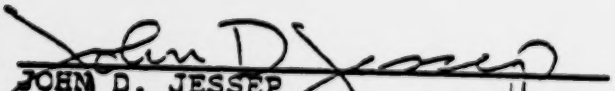
Inasmuch as defendant's mental state became an element of the offense via the state's evidence and the court's instructions thereon and because there was no evidence of sanity introduced by the state to rebut its own evidence of insanity, there was insufficient evidence on that element of the offense, and a judgment of acquittal should have entered. Therefore petitioner's convic-

tion is in violation of this Court's decision in In re Winship, 397 U.S. 358 (1970) and a writ of certiorari should issue to the Connecticut Supreme Court.

CONCLUSION

Petitioner's conviction cannot be upheld in light of the constitutional violations which produced it. Coleman v. Alabama, Sandstrom v. Montana, and In re Winship, demonstrate the constitutional deprivations involved in Mr. Avcollie's trial. Therefore, a writ of certiorari should issue to the Connecticut Supreme Court revising petitioner's conviction.

RESPECTFULLY SUBMITTED
THE PETITIONER

By: 

JOHN D. JESSEP
Koskoff, Koskoff & Bieder, P.C.
55 Chapel Street
Bridgeport, Connecticut 06604
(203) 336-4421

CERTIFICATION

The undersigned, a member of the Bar of this Court, hereby certifies that on the day of March, 1983 he placed in a United States Post Office mail box, first class postage prepaid, three copies of the foregoing Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari to:

Francis M. McDonald, Jr.
State's Attorney for the Judicial
District of Waterbury, Connecticut
300 Grand St.
Waterbury, Connecticut

JOHN D. JESSEP

Motion to Dismiss Indictment

The accused in the above-captioned case respectfully moves that the indictment presently pending against him be dismissed for the following reasons:

1. The indictment for murder is defective because the Connecticut General Statutes, Section 53a-54a imposes upon the accused an affirmative defense contrary to his privilege against self-incrimination and due process of law, guaranteed by the 5th and 14th Amendments to the United States Constitution and Article 1, Sec. 9 of the Connecticut Constitution.

2. The indictment is invalid because it was procured by the State's Attorney for the Judicial District of Waterbury who holds and performs the duties of his office in a manner which violates the separation of powers doctrine of Article 2 of the Connecticut Constitution and of the United States Constitution.

3. The indictment is invalid because the defendant was denied the opportunity to be present in the Grand Jury room during the taking of testimony, said denial having been at the request of the State's Attorney for the Judicial District of Waterbury, and said denial being an abuse of the discretion of the said State's Attorney in the performance of the duties of his office.

4. The indictment for murder is invalid because the defendant was not afforded the opportunity to be present in the Grand Jury room during the taking of testimony, said denial of his right to be present violating the defendant's right to due process of law under the 5th and 14th Amendments to the United States Constitution and Article 1, Sec. 9 of the Connecticut Constitution.

Motion to Dismiss Indictment

5. The indictment for murder is defective because the defendant was not afforded the opportunity to be present in the Grand Jury room during the taking of testimony, said denial of the opportunity to be present denying to the defendant equal protection of the laws guaranteed to him by the 14th Amendment to the United States Constitution.

6. The indictment is invalid because it was returned by a Grand Jury selected in an unconstitutional manner, thereby denying to the defendant due process of law under the 5th and 14th Amendments to the United States Constitution and Article 1, Sec. 9 of the Connecticut Constitution, and also denying the defendant the equal protection of the laws under the 14th Amendment to the United States Constitution.

7. The indictment is invalid because the Grand Jury was tainted by ex-parte communications, thereby denying to the defendant due process of law under the 5th and 14th Amendments to the United States Constitution and Article 1, Sec. 9 of the Connecticut Constitution; and also denying the defendant the equal protection of the laws under the 14th Amendment to the United States Constitution.

8. The indictment for murder is defective because it was returned by a Grand Jury which did not have, in accordance with usual Connecticut practice, a member of the bar as one of its members, or any other safeguard to prevent consideration by the Grand Jury of improper evidence, thereby denying to the accused due process of law under the 5th and 14th Amendments to the United States Constitution and Article 1, Sec. 9 of the Connecticut Constitution; and

also denying the defendant the equal protection of the laws under the 14th Amendment to the United States Constitution.

9. The indictment for murder is defective because the charge to the Grand Jury contains an incomplete and inaccurate statement of the elements of the crime of murder pursuant to the Connecticut General Statutes, Section 53a-54a. The charge to the Grand Jury at page 10, *et seq.* fails to charge that extreme emotional disturbance for which there was a reasonable explanation or excuse is a factor to be considered in determining whether a homicide is a murder. The accused is denied due process of law under the 5th and 14th Amendments to the United States Constitution and under Article 1, Sec. 9 of the Connecticut Constitution, because the element of extreme emotional disturbance is made an affirmative defense, and the defendant is dnied the equal protection of the laws in violation of the 14th Amendment to the United States Constitution, and is contrary to the presumption of the innocence of the accused which is fundamental to our system of criminal justice.

10. The indictment for murder is defective because the charge to the Grand Jury at page 12 requires that the Grand Jurors take into consideration "what was allegedly said, if anything, by the person who is charged", and does not also instruct the Grand Jurors to consider what was said by or what conduct was performed by the decedent or others at the time of the homicide referred to.

11. The indictment for murder is defective because the charge to the Grand Jury at pp. 7-8, 16, instructs the Grand Jurors not to consider hearsay or other inadmissible evi-

dence, but no adequate definitions or standards for identifying hearsay or other inadmissible evidence was given in the charge so that this Grand Jury, on which there was no member of the bar in contravention of the usual Connecticut practice, had no means of determining the propriety of the evidence before it, thereby denying to the defendant due process of law under the 5th and 14th Amendments to the United States Constitution and Article 1, Sec. 9 of the Connecticut Constitution, and also denying the defendant the equal protection of the laws under the 14th Amendment to the United States Constitution.

Service of the foregoing certified to: State's Attorney, Judicial District of Waterbury, 300 Grand Street, Waterbury, Connecticut.

DEFENDANT
BERNARD L. AVCOLLIE

By Gary I. Cohen,
His Attorney

Filed May 12, 1976

Memorandum on Motion to Dismiss Indictment

The defendant has moved to dismiss the Grand Jury indictment for the crime of murder on eleven specific grounds: 1.) Section 53a-54a imposes upon the defendant the burden of the affirmative defense in violation of the 5th and 14th Amendments of the Federal Constitution and Article 1, §9 of the State Constitution; 2.) the procurement by the State's Attorney of the indictment violates the separation of powers doctrine in violation of the Federal and State Constitutions; 3.) that he was not permitted to attend the Grand Jury proceedings in abuse of the discretion of the State's Attorney; 4.) the denial of the defendant's presence at the Grand Jury proceedings violates his right to due process under the 5th and 14th Amendments to the Federal Constitution and Article 1, §9 of the State Constitution; 5.) the denial of the defendant's presence at the Grand Jury proceedings violates his right to equal protection of the law as guaranteed by the 14th Amendment of the Federal Constitution; 6.) the Grand Jury was selected in violation of the 5th and 14th Amendments of the Federal Constitution and Article 1, §9 of the State Constitution by denying him due process and equal protection under the 14th Amendment; 7.) the Grand Jury was "tainted" by ex parte communication in violation of the 5th and 14th Amendments to the Federal Constitution and Article 1, §9 of the State Constitution; 8.) the Grand Jury did not have, in accordance with the usual Connecticut practice, an attorney as one of its members, in violation of the 5th and 14th Amendments of the Federal Constitution and Article 1, §9 of the State Constitution; 9.) the charge to the Grand Jury was defective for failure to explain that extreme emotional disturbance for which there was a reasonable explanation or excuse is a factor in determining whether a homicide is a murder and extreme

emotional disturbance is an affirmative defense which violates the 14th Amendment to the Federal Constitution; 10.) the charge states that the Grand Jurors take into consideration "what was allegedly said, if anything, by the person who is charged", and does not also instruct them to consider what was said by or what conduct was performed by the decedent or others; 11.) that the charge contains an instruction against hearsay and other inadmissible evidence but no standards or definitions of hearsay were given and without the usual attorney as a member, no means of determining the propriety of the evidence was made available in violation of the defendant's constitutional rights.

Grounds one and two, after a lengthy hearing at which arguments and briefs were considered, were denied orally by the court on the basis of the existing law. The defendant in his brief has considered some of the remaining nine grounds together and some separately. Grounds 3, 4 and 5 were argued under a single heading in the defendant's brief and the thrust of his arguments is that there is a distinction between a constitutional Grand Jury and an investigative Grand Jury and that in the latter the presence of the defendant is not required, while in the former where the function is to accuse one person of a crime, his presence is required. It is conceded that the defendant was not given notice of the convening of the Grand Jury and was not present. The defendant states in his brief: "Although the court's charge to the Grand Jury in *Lung's* case establishes the right of the accused to be present in the Grand Jury room during the taking of testimony subsequent cases appear to retreat from that position" and cites as authority for the retreat *State* v. *Wolcott,* 21 Conn. 271, 279:

Memorandum on Motion to Dismiss Indictment

It is claimed now, that every one accused of crime of which a grand-jury takes cognizance, has a constitutional right to be present with the grand-jury, during their investigation. The bill of rights in our constitution declares, that 'in all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, and to have compulsory process to obtain witnesses in his favour,' &x. Stat. 28 §9. This provision has never been understood to apply to grand-jury enquiries; on the contrary, the rule in *Connecticut,* so far back at least as the time of *Peter Lung's* case, in 1815, has been in conflict with this claim of the prisoners. Then the court adopted and published a rule, in the form of a charge to the grand-jury by which counsel were not permitted to be present before them, nor any witnesses on the part of the accused; and this has been followed ever since; shewing conclusively, that the privilege thus conferred by the constitution, has been considered as extending only to trials before petit juries. Nor have we any statute conferring the right now claimed.

Grand juries have a right to investigate offences, and present bills of indictment against persons at large, as well as those in custody or on bail. They have a right to originate charges against offenders, without fore-warning them of their proceedings against them.

State v. *Hamlin,* 47 Conn. 104, 105:

The first question raised by the assignment of errors is, whether the omission of the grand jury to cause the defendant Davis to come before them while the

witnesses produced by the State against him were under examination, vitiated the indictment as against him. It was contended upon the argument in behalf of that defendant that under the rule adopted by the judges of the Supreme Court of Errors in *Lung's Case,* 1, Conn., 482, he had the right to be present before the grand jury while the witnesses produced by the State were under examination by that body, and to put to those witnesses any proper questions. But the rule referred to was intended to confer no such right. It is directory merely. Its purpose was to secure uniformity in the proceedings of grand juries throughout the state so far as it might be done without imposing limitations or restrictions upon the discretionary powers of the court.

Before the adoption of the rule it had been the practice of the court to grant to persons accused of capital crimes, if in custody of the sheriff of the county in which the crimes were committed, the privilege of going before the grand jury while their cases were under investigation and interrogating the witnesses produced by the State against them. But it always rested in the discretion of the court to grant the privilege or to deny it; and the rule in *Lung's case* was not intended to interfere with the exercise of that discretion. The grand jury had, therefore, no authority, unless directed by the court, to cause the defendant Davis to come before them. The plea in abatement contains no allegation that such a direction was given, and in the absence of such an allegation, it must be presumed that no such direction was given. There was no irregularity therefore in the proceedings of the grand jury by reason of their omis-

sion to call the defendant Davis before them, and consequently there is no infirmity in the indictment arising out of that omission.

See *State* v. *Hayes,* 6 Conn. Supp. 215, 223; *State* v. *Menillo,* 159 Conn. 264, 278; *State* v. *Reinosa,* 29 Conn. Supp. 117, 119.

The sixth ground is that the members of the Grand Jury were selected by the High Sheriff of New Haven County in an unconstitutional manner. The facts are that the Grand Jury personnel were selected on twenty-four hours notice over the telephone and all were agreeable to serving when requested. (The defendant terms them volunteers.) The High Sheriff used as a list for telephoning the members the lists in his possession of previous jurors who had served in the past and he called fifty to sixty prospective jurors from those lists until he had secured twenty. The law is clear in this State that a claim of discrimination in the selection of Grand Jurors must be based on the systematic exclusion of an identifiable class. He does not claim that the selection process failed to obtain or to guarantee an impartial Grand Jury drawn from a cross-section of the community and that there was a systematic and intentional exclusion of certain electors of the county, rather, he claims that the High Sheriff did not select the names from the computerized list as has been done for the last several years.

There is no constitutional requirement that members of a grand jury be selected in any particular manner. The constitutional guarantee merely forbids any intentional discrimination against race or class. *Brown* v. *Allen,* 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469; *Akins* v. *Texas,* 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed.

1692. In the *Brown* case the Supreme Court stated (p. 474): 'Our duty to protect the federal constitutional rights of all does not mean we must or should impose on our states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.' Although there can be no intentional discrimination in the selection of jurors, this does not mean that there must be a member of every class or race on the jury. Note, 82 L. Ed. 1053, 1061. 'Fairness in selection has never been held to require proportional representation.' *State* v. *Davies,* 146 Conn. 137, 143, 148 A.2d 251; *Akins* v. *Texas,* supra, 403; 38 Am.Jur. 2d, Grand Jury, §14.

State v. *Cobbs,* 164 Conn. at 409.

This court has recently reviewed the standards for grand jury selection. *State* v. *Cobbs,* 164 Conn. 402, 324 A.2d 234. To reiterate, there is no constitutional requirement that members of a grand jury be chosen in any particular manner. The common-law selection method followed by the sheriff was not inherently unconstitutional. Grand jurors need not be picked at random in order to comply with constitutional requirements forbidding intentional discrimination against race or class, *State* v. *Cobbs,* supra. The constitution demands only that the system employed by the state to select grand jurors produce an array from which a cognizable group or class of citizens has not been systematically excluded. *United States ex rel. Chestnut* v. *Criminal Court,* 442 F.2d 611 (2d Circ.); *United States* v. *Butera,* 420 F.2d 564 (1st Cir.); *State* v. *Cobbs,* supra 4.

State v. *Villafane,* 164 Conn. 644. The High Sheriff's method of selection of the Grand Jurors does not violate the standards set forth in *Cobbs,* supra and *Villafane,* supra. His procedure for selection does not indicate any systematic and intentional exclusion of certain electors or a group of certain electors or an identifiable class. To the claim that "members of the Grand Jury were all volunteers of similar background, experience, age and professional experience" is the answer that even were this true it does not show any systematic and intentional exclusion of certain electors or a group of certain electors or an identifiable class.

The defendant next claims that the indictment is invalid "because the Grand Jury was tainted by ex parte communications". What is meant by ex parte communications is hard to determine and the court is at a loss to understand what is meant. The defendant subpoenaed for a hearing the eighteen members of the Grand Jury. However, the court quashed the subpoenas on the ground that requiring them to testify would be an invasion of the secrecy of the Grand Jury, and undue harassment of citizens performing a duty when called upon by the judicial system.

The 8th and 11th grounds of the motion are that no member of the bar was selected to act as a Grand Juror and as a consequence there is a probability of hearsay evidence being accepted. Neither the federal nor state institutions nor the Connecticut Statutes nor the Practice Book requires that an attorney be a member of each Grand Jury selected. In fact, there is no reference to the subject in any of the authorities aforementioned. While the judge in his charge instructed the Jury not to accept hearsay evidence, the consideration of, and the acceptance of such

evidence will not invalidate the indictment. *State* v. *Menillo,* 159 Conn. 264, 274. "There are also certain errors which the defendant claims were made in the charge to the grand jury. We know of no instance where, in the absence of some clear violation of a defendant's constitutional rights, a successful challenge to the validity of a grand jury charge has been pursued, and the defendant has cited no authority in support of his present contention." *State* v. *Vennard,* Conn. 159, 385, 390. The defendant herein has cited no authority directly bearing on this issue. "It has been the law of this state for many years that an indictment will not be quashed because inadmissible evidence was presented to the grand jury." *State* v. *Wolcott,* 21 Conn. 272, 280; *State* v. *Fasset,* 16 Conn. 457, 471. "In *Costello* v. *United States,* 350 U.S. 359, . . . an indictment based entirely on hearsay was held not to violate" (the fifth amendment requiring indictment for felonies). *State* v. *Stallings,* 154 Conn. 272, 279.

> It is, of course, desirable to elicit evidence which would be admissible in a trial court. No claim is made, however, that evidence of that sort was not elicited in this case. The complaint is only that some undisclosed quantum of inadmissible evidence was also heard. The grand jury, here and in England, has, for hundreds of years, convened as a body of laymen, free from technical rules and acting in secret. Their proceedings "are both 'ex parte' and interlocutory; moreover, the grand jury only seeks for a 'probable cause'; hence, on all principles, the jury-trial rules of Evidence should not apply. Moreover, in point of policy, no rules should hamper their inquiries, nor need a presentment amounting only to probable cause be based on a system

of rigid sifting of evidence. 1 Wigmore, Evidence (3d Ed.) §4, p. 21.

The 9th ground is that the charge failed to include instruction on extreme emotional disturbance for which there was a reasonable explanation or excuse. A Grand Jury has been described as an ex parte proceeding in which the state is required to show probable cause that the defendant committed the crime so that a trial may be had. Proof beyond a reasonable doubt is not required and therefore any affirmative defense is not required to be disproved by the state in such a proceeding, and if such evidence is not required, an instruction by the court is not required. Essentially the defendant's claim on this issue is that §53a-54a is unconstitutional in that it puts the burden of proving the affirmative defense of acting under extreme emotional disturbance on the defendant. It is difficult to understand how the defendant can complain of a failure to give a charge on the portion of the murder statute which he claims makes it unconstitutional. The claim by the defendant is made on the basis of *Mullaney* v. *Wilbur,* 95 S. Ct. 1881 (1975) and *In Re Winship,* 397 U.S. 358. The only decision on the point in Connecticut is *State* v. *Anonymous,* 37 C.L.J. No. 50 (6/1/76) p. 8 (Saden, J.) in which it was held that the word "affirmative" preceding "defense" was nullified and the statute continues without that word in it. This court intends to follow *State* v. *Muolo,* 119 Conn. 323, 325, holding that: "It is incumbent upon any court, in the consideration of an attack upon the constitutionality of a legislative act, to approach the question with great caution, examine it with infinite care, make every presumption and intendment in its favor, and sustain the act unless its invalidity is clear." That

case clearly states it is better for the trial court to leave the decision to the higher court to which the matter may be brought by appeal or other available procedures. It is the defendant's claim that the instruction did not charge all the elements of the crime of murder in that it failed to charge affirmative defenses. The court did charge on the elements of murder and by not charging on affirmative defenses or other defenses it did not fail to give adequate instruction. The court charged on what elements constitute the crime for probable cause—it was not necessary to charge on what the state must prove on a trial of the case, beyond a reasonble doubt.

Ground 10 sets forth that the court charged that the jury could receive evidence of anything said by the person who is charged, but did not instruct that the defendant's actions or other person's actions could be considered. The charge given was correct, admissions or confessions of the person charged are admissible evidence as an exception to the hearsay rule. It would be unnecessary to instruct the jurors regarding actions of the person charged since evidence of his actions or other's actions would be admissible so long as they were pertinent material and relevant to the elements of the crime of murder as set forth in the instruction. Such a procedure constitutes the normal proof of any issue.

In his brief the defendant raises the issue that under the Grand Jury practice the defendant is denied any opportunity to have a judicial or magesterial determination of probable cause as is done in the case of applications and issuance of bench warrants for crimes punishable by sentences of less than life imprisonment. The short answer to this argument is that the Grand Jury procedure is a part of the judicial system. In the main the cases which

the defendant cites from other jurisdictions are reasoned on the ground of adversary proceedings. However, the procedure which he argues for, as it is practiced in Connecticut, is not an adversarial proceeding but consists of a determination of probable cause contained in an evidentiary affidavit presented by the state.

For the reasons stated the Motion to Dismiss the Indictment is denied.

I. Levine, J.

Filed July 27, 1976

Motion to Set Aside Entry of Verdict, Motion for Acquittal and Motion in Arrest of Judgment

Pursuant to §§ 871, 896 et seq. and 905 of the Connecticut Practice Book; Article 1, § 8 of the Connecticut Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, the Defendant, Bernard L. Avcollie, moves that this Court vacate its entry of a judgment of guilty and enter a judgment of acquittal for the following reasons:

1. The charge to the jury at the trial of Mr. Avcollie (a copy of which is attached hereto and made a part hereof as Defendant's Exhibit A) instructed the jury in pertinent part that:

> . . . [I]ntent is a mental process. A person's intention may be inferred from his conduct. *Every person is presumed to intend the natural and necessary consequences of his acts.*

Jury Charge of July 18, 1977 at papge 36 (annexed hereto as Exhibit A) (Emphasis added).

Instructions of this type were held to be unconstitutional by the United States Supreme Court on June 18, 1979 in *Sandstrom* v. *Montana,* —— U.S. ——, 61 L.Ed.2d 39 (1979); *accord State* v. *Harrison,* 41 Conn. Law J. No. 9 at page 3 (August 28, 1979); see also *State* v. *Moye,* 40 Conn. Law J. No. 46 at page 1 (May 15, 1979), *vacated* by the United States Supreme Court *sub nom Moye* v. *Connecticut* (No. 79-274) —— U.S. ——, 62 L.Ed.2d 129 and remanded for reconsideration in light of *Sandstrom* v. *Montana, supra.*

In *Sandstrom* v. *Montana,* the Supreme Court unanimously held that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violated

the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. The Court held that the instruction could be interpreted in two different ways both of which it found to be unconstitutional. A reasonable jury could have found that the presumption was conclusive; that is, a direction from the trial court to find the homicide intentional once it found that the defendant played a part in the victim's death. Alternatively, the jury could have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their "ordinary" consequences), unless the defendant proved the contrary, thereby shifting the burden to the defendant of persuading the jury on the element of intent.

The *Sandstrom* Court's reasoning regarding the conclusive presumption interpretation was not without precedent. In *Morissette* v. *United States*, 342 U.S. 246 (1952), the Court condemned an instruction that intent in the theft of government property could be presumed by the defendant's own act. The Court held that where the "intent of the accused" is an ingredient of the crime, it is a jury issue.

> "It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act. It often is tempting to cast in terms of a 'presumption' a conclusion which a court thinks probable from given facts. . . .
>
> [But] [w]e think presumption intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion

> which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime."

342 U.S. at 274, 275.

The Court also noted that the *Morissette* holding had been reaffirmed in *United States* v. *United States Gypsum*, 438 U.S. 422 (1978) where an anti-trust price-fixing instruction had been given that stated:

> "The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result."

Id. at 430.

The Court determined that intent was an element of the offense charged and therefore held that:

> "[A] defendant's state of mind or intent is an element of a criminal antitrust offense which . . . cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of effect on prices. Cf. Morisette v. United States. . . ."

Id. at 435.

Motion to Set Aside Entry of Verdict, Motion for Acquittal and Motion in Arrest of Judgment

Based upon *Morisette* and *United States Gypsum*, the *Sandstrom* Court felt that the "conclusive presumption" interpretation conflicted with the defendant's presumption of innocence which extends to every element of the crime charged and resulted in a conviction for intentional murder based merely upon the jury's finding that the defendant caused the victim's death without evidence sufficient to find intentional causation.

The Avcollie jury charge is similar in language and imbued with the same vices. The trial court's charge on the element of intent charged as follows:

> The third element which the state must prove is that the person causing the death of the person must have done so with the intent to cause the death. In other words, the state must prove beyond a reasonabe doubt that the accused did strangle Wanda Avcollie, with intent to cause her death.
>
> Now, intent is a mental process. A person's intention may be inferred from his conduct. Every person is presumed to intend the natural and necessary consequences of his acts. It is often impossible and not necessary to prove criminal intent by direct evidence. Ordinarily, intent can be proved only by circumstantial evidence, as I have explained that term to you. What a person's purpose or intention has been is necessarily very largely a matter of inference. A person may take the stand and testify directly as to what his or her purpose or intention was, and that testimony you may believe or not, according to whether or not it warrants belief. But no witness can be expected to come here and testify that he looked into another person's mind and saw therein a certain purpose or in-

tention. The only way in which a jury can determine what a person's purpose or intention was at a given time, aside from the person's own testimony, is by determining what that person's conduct was and what the circumstances were surrounding that conduct, and from those infer what his purpose of intention was. To draw such an inference is not only the privilege but it is also the duty of you, the jury, provided, of course, the inference drawn is a reasonable one. In this case, therefore, it will be part of your duty to draw all reasonable inferences from the conduct of the accused in the light of the surrounding circumstances as to what purpose or intention was in his mind at various times during the evening when the death of the victim occurred.

In order for the accused to be found guilty of the charge of murder, you must find beyond a reasonable doubt that he had an intent to cause the death of Wanda Avcollie. If you do not find beyond a reasonable doubt that the accused had that intent, then he is not guilty of the murder of Wanda Avcollie.

Exhibit A at 35-37.

The trial court's instruction on intent violated *Sandstrom*. The critical passage begins by explaining that "intent is a mental process". It then goes on to state that "[a] person's intention may be inferred from his conduct. Every person is presumed to intend the natural and necessary consequences by his acts", *id.* at 36. Nowhere was the jury instructed on the effect of a presumption or for that matter on the effect of an inference. They were not told that they had the option of inferring or presuming intent. To com-

pound the effect of this instruction, they were then instructed that "[t]o draw such inference is not only the privilege but it is also the *duty* of you the jury, provided, of course, the inference drawn is a reasonable one". The court then emphasized this point by further instructing that "[i]n this case, therefore, it will be part of your duty to draw all reasonable inferences from the conduct of the accused in the light of the surrounding circumstances as to what purpose or intention was in his mind at various times during the evening when the death of the victim occurred", *id.* at 37.

It should also be noted that just prior to the charge on intent, the trial court had charged the jury that ". . . the law presumes every person accused of a crime is of sound mind at the time the crime occurs", *id.* at 35. The issue of insanity was never raised by the defense or by the evidence so that this gratuitous charge served only to compound the court's charge on state of mind and intent which began immediately after the charge on sanity.

In addition to leaving the jury with the impression that they should conclusively find Mr. Avcollie to have intentionally caused his wife's death, should they find that he played a part in the cause of her death, the proscribed instruction also possessed the potential to shift the burden of proof from the State to the defendant to persuade the jury hat her death was *not* intentionally caused, *Sandstrom* at 61 L.Ed.2d 51. This would violate *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975) which held that the State always bears the burden of proving all elements of the offense, and may never shift the burden to a defendant to disprove an element. When the trial court charged that "[a] person may take the stand and testify directly as to what his or her in-

tention was, and that testimony you may believe or not according to whether or not it warrants belief," it placed that burden of proof on the defendant's shoulders in violation of *Sandstrom.*

The Court's attention is respectfully directed also to *State* v. *Moye,* 40 Conn. Law J. No. 46 page 1 (May 15, 1979) wherein the Connecticut Supreme Court found instructions similar to those in Mr. Avcollie's trial to be constitutionally permissible. However, on October 9, 1979, the United States Supreme Court granted Moye's petition for a writ of certiorari and vacated the judgment of the Connecticut Supreme Court and remanded for further consideration in light of *Sandstrom.* It is submitted that *Sandstrom, State* v. *Harris, supra,* and *Moye* dictate the conclusion that the charge to the jury in Mr. Avcollie's case was in violation of the Fourteenth Amendment to the United States Constitution and entitles him to a hearing on relief from this Court.

2. The verdict of guilty rendered by the jury on July 20, 1977 and entered by this Court on January 22, 1980, was not a unanimous verdict. The jury had announced in a written note to the trial court that they stood eleven jurors for conviction and one juror for acquittal. The trial court re-charged the jury with a "modified Chip Smith" charge to which the State excepted and the defense asked for a mistrial to be declared. Approximately three hours later the jury foreman announced that a verdict had been reached. The jurors were asked to stand as their numbers were called and then their foreman announced their verdict of guilty, whereupon the jury was asked to retire again by the trial court. There was never an opportunity for the jury to be polled, and following their return from the jury room, the jury was informed that their guilty verdict had

been set aside and an acquittal entered; they were discharged (see Transcript of July 20, 1977 annexed hereto as Exhibit B).

The Defendant therefore respectfully moves that this Court set aside the verdict of conviction because it was the product of a "modified Chip Smith" charge which was improperly given when the trial court was made aware that the jury stood eleven to one for conviction. The Defendant further moves that this Court set aside the verdict of conviction because the jury's verdict was not unanimous. The last juror to assent to the verdict was compelled to assent because of that juror's critical need for medical prescriptive medication. The juror did not have that medication and was told that the jury would stay until midnight if necessary to reach a unanimous verdict. Rather than be deprived of the medication for that period of time, the juror assented, intending to withdraw that assent at the first opportunity in Court.

The Defendant respectfully requests a hearing on this Motion.

Respectfully submitted,

THE DEFENDANT,
BERNARD AVCOLLIE,

By JOHN D. JESSEP
KOSKOFF, KOSKOFF & BIEDER
His Attorney

Filed January 28, 1980

Memorandum of Decision on Defendant's Motion to Set Aside Entry of Verdict, etc.

On July 20, 1977, the defendant was convicted on a charge of murder by a jury of twelve persons. On motion by the defendant, the court set aside the verdict of guilty and directed an acquittal. The state took an appeal, having received permission to do so, and the defendant moved to dismiss the appeal. On December 20, 1977, the motion to dismiss the appeal was denied. See *State* v. *Avcollie,* 174 Conn. 100. On July 24, 1979, the decision of the trial court setting aside the verdict of guilty and directing an acquittal was reversed. The Supreme Court set aside the judgment of the trial court, reinstated the jury verdict, and remanded the case with direction to render judgment that the defendant is guilty and that sentence be imposed. *State* v. *Avcollie,* Conn. (41 Conn. L.J. No. 4, pp. 1, 8). On January 7, 1980, the United States Supreme Court denied the defendant's petition for writ of certiorari.

On January 28, 1980, the defendant filed a motion to set aside entry of verdict, motion for acquittal, and motion in arrest of judgment. In this motion the defendant claims for the first time that the charge to the jury contained an instruction on the element of intent which violated the Fourteenth Amendment requirement that the state prove every element of the crime charged beyond a reasonable doubt. This instruction was in the following language: "Every person is presumed to intend the natural and necessary consequences of his acts." No exception had been taken to the charge. It is also claimed that the verdict was the product of a "modified Chip Smith" charge and that it was not unanimous. As to this, see *Allison* v. *State,* 168 Conn. 541, 550 n.3.

Leaving aside several procedural difficulties, such as the timeliness of the motion, and whether a second motion to

set aside a verdict on grounds different from those claimed in the first motion may be considered, the motion is denied, because to grant it would be to go beyond the scope of the remand.

It is true that a defendant has a constitutional right to a fair trial. *State* v. *Yates,* 174 Conn. 16, 19. A trial court may set a verdict aside if it correctly concludes that error in the charge was harmful and probably brought about a different result in the verdict. *Farlow* v. *Andrews Corporation,* 154 Conn. 220, 223.

Language very similar to that complained of was held unconstitutional in *Sandstrom* v. *Montana,* U.S. , 61 L. Ed.2d 39, 99 S. Ct. 2450. Under *Sandstrom,* careful attention must be paid to the words actually spoken to the jury, for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.

Language similar to that complained of was condemned as unconstitutional in *State* v. *Harrison,* Conn. (41 Conn. L.J. No. 9, p. 3). However, *Harrison* clearly states that in reviewing instructions to the jury the court looks at the charge as a whole, and will not sever one portion and analyze it in isolation from the rest. *State* v. *Harrison,* supra, 4.

At least eight times during the charge the court told the jury that the burden of establishing guilt beyond a reasonable doubt rested upon the state. (Transcript of charge pp. 9, 11, 15, 31, 36, 37, 40). At least four times the jury was told that the state must prove each element of the crime beyond a reasonable doubt. (Transcript of charge pp. 11, 15, 31, 40). Both before and after the language complained of, the court charged the jury that the burden of proof always remains upon the state and never shifts

to the defendant. (Transcript of charge pp. 11, 40). The jury was instructed that one of the elements which must be proved by the state beyond a reasonable doubt is intent. (Transcript of charge pp. 33, 36, 37). The language complained of appears early in the charge on intent. (Transcript of charge, p. 36). The court went on to explain that what a person's purpose or intention has been is very largely a matter of inference. (Transcript of charge p. 36). The court also said that: "The only way in which a jury can determine what a person's purpose or intention was at a given time, aside from the person's own testimony, is by determining what that person's conduct was and what the circumstances were surrounding that conduct, and from those infer what his purpose or intention was." (Transcript of charge pp. 36, 37). The defendant testified in his own behalf in this case.

The charge clearly delineated the state's burden of proof on every element, including intent, so that the jury could not have been confused. It thus cannot be concluded that a constitutional error brought about the result.

In carrying out the direction of a mandate (of the Supreme Court), the Superior Court is limited to the specific direction of the mandate as interpreted in the light of the opinion. *State Bar Assn.* v. *Connecticut Bank & Trust Co.,* 146 Conn. 556, 561. In carrying out the mandate the Superior Court may not render a new or different judgment. *Mazzotta* v. *Bornstein,* 105 Conn. 242, 244. Compliance means that the direction is not deviated from. The trial court cannot adjudicate rights and duties not within the scope of the remand. *Nowell* v. *Nowell,* 163 Conn. 116, 121. No judgment other than that directed or permitted by the reviewing court may be rendered, even though it

Memorandum of Decision on Defendant's Motion to Set Aside Entry of Verdict, etc.

may be one that the appellate court might have directed. *Nowell* v. *Nowell,* supra. See 5 Am. Jur. 2d, Appeal and Error, Sec. 991; Maltbie, Conn. App. Proc. Sec. 345.

Because it goes beyond the scope of the remand, the motion is denied.

Stoughton, J.

Filed May 14, 1980

Opinion of Connecticut Supreme Court

STATE OF CONNECTICUT *v.* BERNARD AVCOLLIE
(10089)

SPEZIALE, C. J., PETERS, HEALEY, PARSKEY and SHEA, JS.

Indicted for the crime of murder in connection with the death of his wife, the defendant was acquitted of that crime by the trial court which set aside the verdict of guilty returned by the jury. The state, on the granting of permission by the trial court, then appealed to this court, which found error and remanded the matter to the trial court with direction to render judgment that the defendant was guilty. On the defendant's appeal to this court from the judgment of guilty so rendered, *held:*

1. There was sufficient evidence to permit the jury to find the defendant guilty beyond a reasonable doubt.
2. The absence of an attorney on the grand jury panel which indicted the defendant was irrelevant to the validity of the indictment.
3. Because the defendant failed to show that he was harmed by the action of the trial court excluding him, on the ground that he was an attorney, from the proceedings of the grand jury which indicted him, that exclusion, although it constituted an abuse of that court's discretion, did not constitute reversible error.
4. The trial court correctly granted the state's motion to quash subpoenas issued by the defendant to the grand jurors who had returned the indictment, the defendant having failed to lay any foundation in support of his claim that the grand jury was "selected in an unconstitutional manner."
5. There was no merit to the defendant's claim—raised for the first time on appeal, but considered under the bypass rule of *State* v. *Evans* (165 Conn. 61, 327 A.2d 576 [1973])—that he was denied due process by the trial court's instruction to the jurors to consider his interest in the outcome of the case when they weighed his credibility.
6. The defendant's challenge to the trial court's charge on the issue of sanity, having been made for the first time on appeal, did not warrant consideration by this court.
7. The trial court's charge on intent was not likely to have misled the jury.
8. The trial court did not err in giving a supplemental "Chip Smith" charge, the fact that that court knew that the jurors were deadlocked eleven to one notwithstanding.

9. The trial court did not err, following this court's remand of the matter to it for reinstatement of the verdict and imposition of judgment, in refusing, as beyond the scope of that remand, to hear juror testimony proffered by the defendant in support of his claim that the original verdict was not unanimous.

Argued October 7—decision released December 14, 1982

Indictment charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Cohen, J.;* the trial court set aside the jury's verdict of guilty and rendered a judgment of acquittal; this court, on appeal by the state, set aside the judgment, reinstated the jury's verdict, and remanded the case to the trial court with direction to render judgment that the defendant was guilty and to impose sentence; on denial of certiorari by the United States Supreme Court, the trial court, *Stoughton, J.,* rendered judgment of guilty, from which the defendant appealed to this court. *No error.*

John D. Jessep, with whom, on the brief, was *Theodore I. Koskoff,* for the appellant (defendant).

Francis M. McDonald, Jr., state's attorney, with whom were *Paul E. Murray* and *Catherine J. Capuano,* assistant state's attorneys, for the appellee (state).

Speziale, C. J. The defendant, Bernard Avcollie, was indicted on November 21, 1975, for the murder of his wife. After a jury trial, the jury returned a verdict of guilty which, at the defendant's request, was immediately set aside by the trial judge, who rendered a judgment of acquittal. The state, with permission of the trial court pursuant to General Statutes § 54-96, appealed the judgment to this court. After a review of the record, we concluded

that it supported the jury's verdict. We therefore found error, set aside the judgment of the trial court, reinstated the jury verdict, and remanded the case with direction to render judgment that the defendant was guilty and to impose sentence. *State* v. *Avcollie,* 178 Conn. 450, 471, 423 A.2d 118 (1979).[1] The defendant's petition for certiorari addressed to the United States Supreme Court was denied, 444 U.S. 1015, 100 S. Ct. 667, 62 L. Ed. 2d 645 (1980), and judgment of guilty and imposition of sentence followed.

The defendant now appeals from that judgment, challenging (1) the sufficiency of the evidence; (2) the grand jury procedure and selection; (3) the court's charge to the jury on the issues of (a) the defendant's testimony; (b) sanity; and (c) intent; (4) the giving of a supplemental "Chip Smith" charge; and (5) the court's refusal to hear juror testimony regarding the verdict.

I

Sufficiency of the Evidence

The defendant claims that the evidence was insufficient as a matter of law to support the jury's verdict. This court has already held otherwise. *State* v. *Avcollie,* 178 Conn. 450, 423 A.2d 118 (1979). In a belated reargument,[2]

---

[1] A detailed statement of facts is unnecessary to our determination of this appeal, but may be found in our prior opinions in this case, *State* v. *Avcollie,* 178 Conn. 450, 423 A.2d 118 (1979), cert. denied, 444 U.S. 1015, 100 S. Ct. 667, 62 L. Ed. 2d 645 (1980), and *State* v. *Avcollie,* 174 Conn. 100 384 A.2d 315 (1977). Facts relating to specific claims will be included in our discussion thereof.

[2] The proper procedure to correct errors in an opinion of this court is to file a motion to reargue within ten days of the date when the decision is announced. Practice Book § 3111A. The defendant did not avail himself of this procedure at the appropriate time.

the defendant claims several factual inaccuracies in our earlier opinion. We remain convinced that our decision correctly held that there was sufficient evidence to permit the jury to find the defendant guilty beyond a reasonable doubt.

II

The Grand Jury

Wanda Avcollie, the defendant's wife, was found floating in the family swimming pool at approximately 2 a.m. on October 30, 1975. At about 2:47 a.m. she was pronounced dead by the medical examiner of Waterbury. On November 21, 1975, a grand jury returned a true bill accusing the defendant of murdering Wanda Avcollie, in violation of General Statutes § 53a-54a.

The Avcollie grand jury was unusual in two ways. First, no attorney was included on the panel. Second, on motion of the state's attorney, the defendant was neither informed of the proceedings nor allowed to be present during the taking of evidence. The defendant claims that a grand jury so conducted violates article I, section 8 of the Connecticut constitution,[3] and denies an accused due process. We find no merit in this claim.

When the grand jury in this case was sitting, grand jury procedure was almost entirely governed by the common law.[4] "The state's attorney lays before the court a bill

---

[3] "[Conn. Const. Art. I § 8] (RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS. . . . PRESENTMENT OF GRAND JURY, WHEN NECESSARY).

Sec. 8. ". . . No person shall be held to answer for any crime, punishable by death or life imprisonment, unless on a presentment or an indictment of a grand jury. . . ."

[4] Grand jury procedure was first extensively codified in the 1976 amendments to the Practice Book, 1963, as §§ 2012-22. These

of indictment for murder . . . ; the court orders a grand jury to be summoned to consider it; the state's attorney submits a list of witnesses, but neither he nor any counsel for the accused is in the grand jury room . . . . The grand jury proceedings . . . are conducted in secret. *State* v. *Coffee,* 56 Conn. 399, 410, 16 A. 151 [1888]. While the accused is not, as a matter of right, entitled to be present within the grand jury room, in practice . . . he is allowed the privilege of being present in the grand jury room during the taking of evidence by the grand jury although not during their deliberations. *State* v. *Fasset,* 16 Conn. 457, 469 [1844]." *State* v. *Menillo,* 159 Conn. 264, 273-74, 268 A.2d 667 (1970).

A

Absence of an Attorney from the Panel

Although it is the usual practice in this state to include an attorney on the grand jury panel; *State* v. *Menillo,* supra, 274 n.1; nothing in our case law or the present statutes *requires* it. The defendant does not claim otherwise, but submits that improper, inadmissible evidence may have been heard by the grand jury because no attorney was present, and that he was prejudiced thereby.

This claim seems to assume that the grand jury functions like a trial before a petit jury, where evidentiary rules are required. The defendant misconceives the pur-

---

amendments were adopted June 7, 1976, to take effect October 1, 1976. The current rules are essentially the same and may be found at Practice Book, 1978, §§ 604-14.

The only provisions of the Practice Book relating to grand juries in 1975 were § 477D (". . . the proceedings before . . . [the] grand jury shall be secret and no attorney for the state or for an accused shall be present . . . .") and § 477E (challenge to the array).

pose of the grand jury. "It is, of course, desirable to elicit evidence which would be admissible in a trial court. No claim is made, however, that evidence of that sort was not elicited in this case. The complaint is only that some undisclosed quantum of inadmissible evidence was also heard. The grand jury, here and in England, has, for hundreds of years, convened as a body of laymen, free from technical rules and acting in secret. Their proceedings 'are both "ex parte" and interlocutory; moreover, the grand jury only seeks for a "probable cause"; hence, on all principles, the jury-trial rules of Evidence should not apply. Moreover, in point of policy, no rules should hamper their inquiries, nor need a presentment amounting only to probable cause be based on a system of rigid sifting of evidence. 1 Wigmore, Evidence (3d Ed.) § 4, p. 21." *State* v. *Stallings*, 154 Conn. 272, 280, 224 A.2d 718 (1966); see also *State* v. *Stepney*, 181 Conn. 268, 272, 435 A.2d 701 (1980), cert. denied, 449 U.S. 1077, 101 S. Ct. 856, 66 L. Ed. 2d 799, (1981); *State* v. *Fasset*, 16 Conn. 457, 472-73 (1844). Because grand juries are permitted to return a true bill based on inadmissible evidence, the absence of an attorney on the *Avcollie* panel is irrelevant to the validity of the indictment.

B

Exclusion of the Defendant from the Proceedings

When the grand jury was summoned, the state requested that the defendant not be allowed to attend the proceedings because he was an experienced criminal defense attorney. The court granted the request, and the defendant was given no notice of the investigation until the indictment was returned. The defendant contends that he had a right to attend the taking of evidence, and that the

denial of this alleged right invalidates the indictment. We disagree.

There is no doubt that from the earliest times an accused has generally been allowed to attend the grand jury proceedings and to cross-examine witnesses. See, e.g., *State* v. *Menillo,* supra, 274-75; *State* v. *Wolcott,* 21 Conn. 272, 279 (1851); *Lung's case,* 1 Conn. 428 (1815). Although in *State* v. *Stallings,* supra, 282, we mistakenly referred to this practice as a "right," the correct rule is stated in *State* v. *Hamlin,* 47 Conn. 95, 104-105 (1879): "It was contended upon the argument in-behalf of that defendant that under the rule adopted by the judges of the Supreme Court of Errors in *Lung's case,* 1 Conn. [428], he had the right to be present before the grand jury while the witnesses produced by the State were under examination by that body, and to put to those witnesses any proper questions. But the rule referred to was intended to confer no such right. It is *directory* merely. Its purpose was to secure uniformity in the proceedings of grand juries throughout the state so far as it might be done without imposing limitations or restrictions upon the discretionary powers of the court. Before the adoption of the rule it had been the practice of the court to grant to persons accused of capital crimes, if in custody of the sheriff of the county in which the crimes were committed, the privilege of going before the grand jury while their cases were under investigation and interrogating the witnesses produced by the State against them. But it always rested in the discretion of the court to grant the privilege or to deny it; and the rule in *Lung's case* was not intended to interfere with the exercise of that discretion. The grand jury had, therefore, no authority, unless directed by the

court, to cause the defendant Davis to come before them." (Emphasis added.)

More recently, in *State* v. *Menillo,* supra, we clearly indicated that the practice of allowing the defendant to attend the grand jury proceedings was grounded upon sound judicial discretion which could be exercised to exclude the defendant for good cause. We there stated "where [the accused] is in custody within this state or his whereabouts are either known to the state or readily ascertainable, we think that, *in the absence of good cause or reason to the contrary,* he *should* be given the usual opportunity, although of course he cannot be compelled, to be present in the grand jury room during the examination of the state's witnesses against him." (Emphasis added.) *State* v. *Menillo,* supra, 278. In *Menillo,* the defendant was excluded because of threats made to witnesses who were expected to testify before the grand jury. "This did not invalidate the grand jury proceedings, although it was a departure from the usual Connecticut practice." Id.[5]

We find that the trial court abused its discretion in excluding the defendant from the grand jury proceedings merely because he is an attorney. The defendant, however, has failed to show that he was harmed by this abuse of discretion. Therefore, although the court's action was wrong, it does not constitute reversible error.

---

[5] The judges of the Superior Court in effect confirmed that the practice in Connecticut was to allow the defendant to attend the taking of evidence *subject to the discretion of the judge* when they promulgated § 2017 of the Practice Book, 1963 (adopted June 7, 1976, to take effect Oct. 1, 1976). This section reads in part: "The following persons may be present while the grand jury is taking evidence: * * * (4) The defendant, within the discretion of the judicial authority." This section, as amended, is now § 609 of the 1978 Practice Book. See, generally, *State* v. *Canady,* 187 Conn. 281, 445 A.2d 895 (1982).

C

Quashing of Subpoenas to the Grand Jurors

On May 12, 1976, the defendant filed a motion to dismiss the indictment. The defendant claimed, inter alia, that the grand jury was "selected in an unconstitutional manner," denying the defendant due process and equal protection under the law. The motion stated no factual basis for the claim. At a hearing on the motion, defense counsel questioned the sheriff of New Haven County at length about the method used to select the grand jury panel. The defense also subpoenaed each of the grand jurors from the panel to testify. The state moved to quash the subpoenas. In opposition to the motion to quash, defense counsel asserted a need to question the grand jurors about their background, race, and qualifications. He stated that he hoped to discover thereby whether this grand jury was a representative cross-section of the community, whether it was a blue-ribbon grand jury, and whether there had been intentional discrimination against some class of persons, possibly professional people or attorneys. The court granted the motion to quash the subpoenas.

"There is no constitutional requirement that members of the grand jury be selected in any particular manner. The constitutional guarantee merely forbids any intentional discrimination against race or class. *Brown* v. *Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 [1953]; *Akins* v. *Texas*, 325 U.S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692 [1945]." *State* v. *Cobbs*, 164 Conn. 402, 409, 324 A.2d 234, cert. denied, 414 U.S. 861, 94 S. Ct. 77, 38 L. Ed. 2d 112 (1973). To prevail on a claim of grand jury discrimination, the challenger must demonstrate that there was an intentional and systematic exclusion of a constitutionally cognizable group. *Rose* v. *Mitchell*, 443 U.S. 545, 565, 99 S. Ct. 2993, 61 L. Ed.

2d 739 (1979); *Castaneda* v. *Partida,* 430 U.S. 482, 494, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977); see, generally, *State* v. *Villafane,* 164 Conn. 637, 644-51, 325 A.2d 251 (1973). Random selection is not required; *State* v. *Villafane,* supra, 644; *State* v *Cobbs,* supra; nor does every identifiable class or race need to be represented *State* v. *Cobbs,* supra, 409.

Counsel for the defendant made no attempt to lay a foundation for the general allegations in the defendant's motion to dismiss. When questioned by the court, he admitted he could be accused of being on a fishing expedition and was unable to say what class was being discriminated against. Defense counsel also indicated that he did not intend to limit his inquiry to discrimination, but rather hoped to pursue a general investigation into the selection of grand jurors. Although an investigator was retained by the defense, he was never called to testify. Nor was the sheriff questioned about systematic exclusion of jurors. The defense presented neither evidence nor affidavits which indicated that the defendant had a viable claim.

A defendant has a right to challenge an improperly selected grand jury. "More than a bare assertion that the system used was discriminatory, however, is required to overcome the presumption that the grand jury was selected in a proper manner." *State* v. *Cobbs,* supra, 408-409; *State* v. *Davis,* 158 Conn. 341, 345, 260 A.2d 587, remanded for resentencing, 408 U.S. 935, 92 S. Ct. 2856, 33 L. Ed. 2d 750 (1969). In addition, before a court will permit a full-scale interrogation of the jury panel, a defendant must show, by some independent evidence, that there are reasonable grounds to suspect that the panel is improperly constituted.

"This does not, of course, require that the challenge *show* that the panel is improperly constituted; but what it *does* require is that the challenger assert *facts* that tend to raise a doubt as to whether the panel *may* be improperly

constituted. Then follows the inquiry to see if such suspicion, duly alleged, is supported by proof.

"To require a full-scale investigation of the grand jury panel solely upon a mere assertion, not supported by so much as an affidavit . . . that the panel was improperly drawn, would be to open *every* grand jury panel, no matter how perfectly impartial and representative, to a full-scale investigation—or perhaps more accurately, to a fishing expedition of broad range. Such a course would consume enormous amounts of time and energy of our already overburdened trial courts, with concomitant delays in their calendars, and would be especially injurious to the prompt disposition of justice." (Emphasis in original.) *Rojas* v. *State*, 288 So. 2d 234, 237 (Fla. 1973).

The trial court correctly granted the state's motion to quash the subpoenas.

III

Charge to the Jury

A

The defendant's testimony

The defendant next claims that the trial court erred in its charge to the jury by instructing them that they should consider the deefndant's interest in the outcome of the case when weighing his credibility as a witness.[6] The defen-

[6] The charge was as follows: "An accused person is not obliged to take the witness stand in his own behalf. On the other hand, he has a perfect right to do so. In weighing the testimony that he has given you, you should apply the same principles by which the testimony of other witnesses are tested, and that necessarily involves a consideration of his interest in the case. You will consider the importance to him of the outcome of this trial. An accused person having taken the witness stand, stands before you just like any other witness and is entitled to the same considera-

dant's constitutional claim is that the charge denies him due process of law. Although the defendant failed to take an exception to this part of the charge, and raises this claim for the first time on appeal, we have previously considered a challenge to similar instructions under the bypass rule of *State* v. *Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973), and will address the claim here. See *State* v. *Maselli*, 182 Conn. 66, 74, 437 A.2d 836 (1980), cert. denied, 449 U.S. 1083, 101 S. Ct. 868, 66 L. Ed. 2d 807 (1981); *State* v. *Mastropetre*, 175 Conn. 512, 524, 400 A.2d 276 (1978).[7]

This claim is totally without merit. We have without exception rejected challenges to language substantially the same as that challenged here in a line of cases starting as early as 1893. *State* v. *Maselli*, supra; *State* v. *Mastropetre*, supra; *State* v. *Bennett*, 172 Conn. 324, 374 A.2d 247 (1977); *State* v. *Jonas*, 169 Conn. 566, 363 A.2d 1378 (1975), cert. denied, 424 U.S. 923, 96 S. Ct. 1132, 47 L. Ed. 2d 331 (1976); *State* v. *Blyden*, 165 Conn. 522, 528, 338 A.2d 484 (1973); *State* v. *Moynahan*, 164 Conn. 560, 574, 325 A.2d 199, cert. denied, 414 U.S. 976, 94 S. Ct. 291, 38 L. Ed. 2d 219 (1973); *State* v. *Guthridge*, 164 Conn. 145, 151, 318 A.2d 87 (1972), cert. denied, 410 U.S. 988, 93 S. Ct. 1519, 36 L. Ed. 2d 186 (1973); *State* v. *Palko*, 122 Conn. 529, 534, 191 A. 320, aff'd, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937); *State* v.

---

tion and must have his testimony measured in the same way as any other witness, including, of course, his interest in the verdict which you are to render."

[7] We find inapposite language to the contrary in *State* v. *Kish*, 186 Conn. 757, 769-70, 443 A.2d 1274 (1982), *State* v. *Miller*, 186 Conn. 654, 668-69, 443 A.2d 906 (1982), and *State* v. *Kurvin*, 186 Conn. 555, 570, 442 A.2d 1327 (1982), and reaffirm and adhere to our holding as previously set forth in *State* v. *Maselli*, 182 Conn. 66, 74, 437 A.2d 836 (1980), cert. denied, 449 U.S. 1083, 101 S. Ct. 868, 66 L. Ed. 2d 807 (1981); *State* v. *Mastropetre*, 175 Conn. 512, 523-25, 400 A.2d 276 (1978).

Schleifer, 102 Conn. 708, 725, 130 A. 184 (1925); *State* v. *Saxon,* 87 Conn. 5, 22, 86 A. 590 (1913); *State* v. *Fiske,* 63 Conn. 388, 392, 28 A. 572 (1893).

B

Sanity charge

The defendant also objects to the charge on the issue of sanity, claiming that it raised an impermissible presumption as to an element of the crime. The defendant concedes that he did not raise the issue of sanity at trial, and also acknowledged in his motion for acquittal of January 28, 1980, that "[t]he issue of insanity was never raised by the defense or by the evidence."

Further, the defendant filed no request to charge on the issue of sanity and took no exception at trial. We therefore refuse to consider this claim, raised for the first time on appeal; *State* v. *Kurvin,* 186 Conn. 555, 563-64, 442 A.2d 1327 (1982); *State* v. *Holmquist,* 173 Conn. 140, 151, 376 A.2d 1111, cert. denied, 434 U.S. 906, 98 S. Ct. 306, 54 L. Ed. 2d 193 (1977); *State* v. *Green,* 172 Conn. 22, 28-29, 372 A.2d 133 (1976).

C

Charge on intent

The defendant's final objection to the jury charge is that the charge on intent violates the rule of *Sandstrom* v. *Montana,* 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). Although no exception was taken to the charge, this court has previously considered *Sandstrom* claims under the bypass rule of *State* v. *Evans,* supra, when the issue of intent was central to the case. See *State* v. *Cosgrove,* 186 Conn. 476, 442 A.2d 1320 (1982); *State* v.

Truppi, 182 Conn. 449, 438 A.2d 712 (1980), cert. denied, 451 U.S. 941, 101 S. Ct. 2024, 68 L. Ed. 2d 329 (1981).

The intent instruction used by the court here is essentially the same as that approved in *State* v. *Maselli*, supra, 75n, 77n. The total charge is indistinguishable from numerous charges which we have repeatedly approved following the *Sandstrom* decision; see *State* v. *Miller*, 186 Conn. 654, 667-68, 443 A.2d 906 (1982); *State* v. *Mason*, 186 Conn. 574, 582-84, 442 A.2d 1335 (1982); *State* v. *Cosgrove*, 186 Conn. 476, 480-84, 442 A.2d 1320 (1982); *State* v. *Pina*, 186 Conn. 261, 264, 440 A.2d 967 (1982); *State* v. *Stankowski*, 184 Conn. (42 CLJ 46, pp. 5, 14-15) 439 A.2d 918, cert. denied, 454 U.S. 1052, 102 S. Ct. 596, 70 L. Ed. 2d 588 (1981); *State* v. *Brokaw*, 183 Conn. (42 CLJ 31, pp. 9, 11) 438 A.2d 815 (1981); *State* v. *Truppi*, supra, 453; *State* v. *Nemeth*, 182 Conn. 403, 411, 438 A.2d 120 (1980); *State* v. *Vasquez*, 182 Conn. 242, 253, 438 A.2d 424 (1980); *State* v. *Maselli*, supra, 75-76; *State* v. *Perez*, 181 Conn. 299, 311-16, 435 A.2d 334 (1980); *State* v. *Arroyo*, 180 Conn. 171, 173-81, 429 A.2d 457 (1980); *State* v. *Harrison*, 178 Conn. 689, 692-99, 425 A.2d 111 (1979); and does not include the conclusive presumption language consistently condemned by this court. *Turcio* v. *Manson*, 186 Conn. 1, 6, 439 A.2d 437 (1982); *State* v. *Johnson*, 185 Conn. (43 CLJ 5, pp. 5, 9) 440 A.2d 858 (1981), cert. granted, U.S. , 102 S. Ct. 1426, 72 L. Ed. 2d 170 (1982). Our review of the charge as a whole convinces us that the charge here was not likely to mislead the jury.[8]

[8] The defendant asserts that the instruction used here is identical to that given in *State* v. *Moye*, 177 Conn. 487, 493, 418 A.2d 870, vacated, 444 U.S. 983, 100 S. Ct. 199, 62 L. Ed. 2d 129, on remand, 179 Conn. 761, 409 A.2d 149 (1979), where we ultimately ordered a new trial. He claims, therefore, that we must find error. This claim is without merit for the reasons stated in *State* v. *Cosgrove*, 186 Conn. 476, 482 n.3, 442 A.2d 1320 (1982).

IV

Chip Smith Charge

During their deliberations, the jury sent a note to the court stating that they were deadlocked eleven to one for conviction and requesting guidance. The court then gave a modified version of the "Chip Smith" charge.[9] See *State* v. *Smith*, 49 Conn. 376 (1881).

The "Chip Smith" charge has been so consistently upheld by this court that the defendant does not challenge it directly. See *State* v. *Stankowski*, 184 Conn. (42 CLJ 46, pp. 5, 13-14) 439 A.2d 918, cert. denied, 454 U.S. 1052, 102 S. Ct. 596, 70 L. Ed. 2d 588 (1981), and cases cited

---

[9] The court charged as follows:

"Previously in my charge I said this to you: To support a verdict it must be a unanimous one. But that did not mean that each juror should pursue his own deliberations and judgment with no regard to the arguments and conclusions of his fellows. Or that having reached a conclusion he should obstinately adhere to it without a conscious effort to test its validity by other views entertained by other jurors equally wise and justly resolved to do their duty.

"To put it another way succinctly: Although the verdict to which a juror agrees must, of course, be his own conclusion and not a mere acquiescence in the conclusion of his fellows, yet in order to bring twelve minds to a unanimous result, the jurors should examine with candor the questions submitted to them and with due regard and deference to the opinions of each other. In conferring together the jury ought to pay proper respect to each other's opinions. The jurors ought not to doubt the conclusions of a judgment which is not concurred in by most of those with whom you are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of your fellows.

"I am going to ask you to go back to the jury room and discuss this case further.

"If you reach an impasse you can so notify the Court with the simple statement that you cannot agree or that you have reached an impasse.

"You may now go back."

therein. Rather, the defendant claims that when the court knows that the jury are deadlocked eleven to one for conviction, and the jury know that the judge knows the division, the "Chip Smith" charge is tantamount to a directed verdict of guilty. This overlooks the fact that the "Chip Smith" charge, while encouraging a continued search for unanimity, also stresses that each juror's vote must be "his [or her] own conclusion and not a mere acquiescence in the conclusions of his [or her] fellows . . . ." The language of the charge does not direct a verdict, but encourages it. We agree with the Second Circuit Court of Appeals which held, in a situation directly parallel to this one: "The fact that the judge knew that there was a lone dissenter does not make the charge coercive inasmuch as the nature of the deadlock was disclosed to the Court voluntarily and without solicitation. See *Bowen* v. *United States,* 153 F.2d 747 (8th Cir. 1946). To hold otherwise would unnecessarily prohibit the use of the Allen charge[10] in circumstances where the judge was made aware of the numerical division of the jurors, for example, by an overzealous juror, although he had not made the forbidden inquiry himself." *United States* v. *Meyers,* 410 F.2d 693, 697 (2d Cir.), cert. denied, 396 U.S. 835, 90 S. Ct. 93, 24 L. Ed. 2d 86 (1969). See also *United States* v. *Robinson,* 560 F.2d 507, 517-18 (2d Cir. 1977), upholding the use of the *Allen* charge although the judge knew of an eleven to one deadlock and knew the identity of the dissenter.

The court did not err in giving the supplemental "Chip Smith" charge in these circumstances.

---

[10] The *Allen* charge (*Allen* v. *United States,* 164 U.S. 492, 501, 17 S. Ct. 154, 41 L. Ed. 528 [1896]) is the federal equivalent of the "Chip Smith" charge. See *State* v. *Walters,* 145 Conn. 60, 64, 138 A.2d 786, cert. denied, 358 U.S. 46, 79 S. Ct. 70, 3 L. Ed. 2d 45 (1958).

V

Exclusion of Juror Testimony

The jury returned their verdict on July 20, 1977. In accordance with traditional procedure, each juror was called by name and asked to remain standing while the verdict was delivered. The court clerk asked whether a verdict had been reached, and the foreman replied that it had. The clerk then stated: "Ladies and gentlemen of the jury, look upon the accused, you that have been sworn. What say you as to Case Number 12,468, Connecticut versus Bernard Avcollie. Is Bernard Avcollie guilty of the crime of Murder, in violation of Section 53a-54a of the Connecticut General Statutes, or not guilty" The foreman replied "He is guilty," and no juror took exception to the verdict. Defense counsel immediately asked that the jury be excused, and the court excused the jury. The court then granted the defendant's motion for acquittal and the jury were discharged.

As previously noted, this court set aside the judgment of the trial court, reinstated the verdict, and remanded the case with direction to render judgment that the defendant was guilty and to impose sentence. After the remand, the defendant attempted to bring to the trial court's attention for the first time a claim that the original jury verdict was not unanimous. In support of this claim, the defendant proposed to call juror Edith Cass to testify that her vote was the result of ill health and coercion by her fellow jurors. The trial court refused to hear this testimony, stating in its memorandum decision that it was "limited to the specific direction of the [Supreme Court] mandate as interpreted in the light of the opinion. *State Bar Assn.* v. *Connecticut Bank & Trust Co.*, 146 Conn. 556, 561 [153 A.2d 453 (1959)]. In carrying out the mandate the Superior Court may not render a new or different judgment. *Maz-*

zotta v. *Bornstein,* 105 Conn. 242, 244 [135 A. 38 (1926)]. Compliance means that the direction is not deviated from. The trial court cannot adjudicate rights and duties not within the scope of the remand. *Nowell* v. *Nowell,* 163 Conn. 116, 121 [302 A.2d 260 (1972)]." The trial court was correct in not going beyond the scope of the remand.

Furthermore, the defendant's offer of proof concerns either the personal reasons for Mrs. Cass' vote or the deliberative process itself. In *Aillon* v. *State,* 168 Conn. 541, 550, 363 A.2d 49 (1975), we announced a rule concerning juror testimony " 'which excludes, as immaterial, evidence as to the expressions and arguments of the jurors in their deliberations and evidence as to their own motives, beliefs, mistakes and mental operations generally, in arriving at their verdict.' McCormick, Evidence (2d Ed.) § 68, p. 148." Testimony concerning a juror's illness or the persuasive tactics of fellow jurors is clearly excluded under this rule, and it would have been highly improper to allow testimony of the sort proposed by the defendant. *Aillon* v. *State,* supra, 550 n.3.

Finally, we note that the defendant failed to move for the jury to be polled,[11] but rather moved to excuse the jury immediately after the verdict was announced. The decision to poll the jury is discretionary with the court; *State* v. *Tucker,* 181 Conn. 406, 420, 435 A.2d 986 (1980); however, we are reluctant to review a claim that a verdict is not unanimous when trial counsel, who observed the jury when the verdict was delivered, saw no reason to request a poll at that time.

There is no error.

In this opinion the other judges concurred.

---

[11] Practice Book, 1963, § 2280, now Practice Book, 1978, § 869.

Order on Motion for Reargument

SUPREME COURT
STATE OF CONNECTICUT

January 3, 1983

No. 10089

STATE OF CONNECTICUT

v.

BERNARD AVCOLLIE

ORDER

The defendant's Motion for Reargument having been presented to the court, it is hereby ordered denied.

By the Court

/s/ DONALD H. DOWLING
Chief Clerk

Notice to:

Koskoff, Koskoff & Bieder, P.C.
Francis M. McDonald, S.A.
Clerk, Waterbury J.D.

January 4, 1983

[THIS PAGE INTENTIONALLY LEFT BLANK]

No. 82-1460

IN THE

Supreme Court of the United States

October Term, 1982

BERNARD AVCOLLIE,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent.

On Writ of Certiorari to The Supreme Court of the State of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

FRANCIS M. MCDONALD
State's Attorney and Counsel of Record

CATHERINE J. CAPUANO
Special Assistant State's Attorney

300 Grand Street
Waterbury, CT 06702
P. O. Box 1245
(203) 756-4431

QUESTIONS PRESENTED

1. Whether the trial court's quashing of the grand juror subpoenas requires the granting of certiorari?

2. Whether the trial court's charge concerning intent requires the granting of certiorari?

3. Whether the trial court's charge concerning sanity requires the granting of certiorari?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

No. 82-1460

IN THE

Supreme Court of the United States

October Term, 1982

BERNARD AVCOLLIE,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent.

On Writ of Certiorari to The Supreme Court of the State of Connecticut

---

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This brief is submitted in opposition to a petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Connecticut entered in this proceeding on December 14, 1982.

STATEMENT OF THE CASE

I.

The defendant, a white male, was indicted for murder by a grand jury on November 21, 1975 and moved to dismiss his indictment before trial. During the hearing on that motion, his attorney subpoenaed the entire grand jury panel in an effort to question each of them about their grand jury service. The trial judge quashed the subpoenas because the defendant's attorney failed to make a showing that their testimony was required or relevant. *State v. Avcollie*, 188 Conn. 626, 629, 633-36, 453 A.2d 418, 420, 422-23 (1982).

II.

The defendant then went on trial charged with the murder of his wife, Wanda, whose body was found in the family swimming pool at about 2:00 a.m. on October 30, 1975. (T-62-74). Throughout the trial the defendant contested the fact that his wife was strangled as the prosecution claimed. His medical experts claimed that she had drowned. (T-1300, 1323, 1442, 1560). The defendant himself took the stand and testified that he did not strangle or kill his wife and that she was alive but obviously under the influence of liquor the last time he saw her at 12:30 a.m. that morning. (T-1105). The defendant also stated that he found some pentobarbital and valium pill bottles that morning open on the bathroom sink (T-801-02, 1183) and that his wife had been depressed. (T-1070). Witnesses testified the defendant claimed his wife had been taking pills and liquor just before her death. (T-1089, 1679-85). The autopsy tests, however, revealed that Mrs. Avcollie was not under the influence of alcohol or drugs when she died by strangulation (T-808, 565, 571-72) and that the level of pentobarbital (total ½ pill) in her liver and blood as well as her stomach contents showed she was killed before 12:30 a.m. at a time when she was alone with the defendant, according to the defendant, and engaged in a violent confrontation. (T-791, 793-95, 805-08, 880, 1100-03). No valium was found in her body. (T-

805-06). Other witnesses denied Mrs. Avcollie's depression and use of alcohol and drugs (T-1680, 1688) and testified that the defendant was "house-hunting" (the $115,000.00 range) with his girlfriend, her children, and his children only shortly before the murder. (T-895-903). The defendant himself stated he was in love with his girlfriend. (T-1063, 1146).

There was also testimony that the defendant's house was jointly held with his wife (T-1163), that his wife had determined to confront the defendant that evening, to get him out of the house, to seek a divorce herself and not to reduce her standard of living in those circumstances. (T-1679-84, 1690-93). While discussing her reasons for the breakup of their marriage, Mrs. Avcollie stated in reference to the defendant's well-known and multiple extra-marital affairs that the defendant was "sick." (T-1145-46).

III.

At the defendant's request the judge charged the trial jury only with respect to the crime of murder. His charge instructed the jury that it was its function to find the facts and draw such proper inferences from those facts as it might reasonably and logically draw. (T-3-4, Jury Charge, 7/18/77). The jury was told it was the inferences which it may draw from the evidence which would prevail, regardless of what the court said to it about the evidence. (T-2, Jury Charge, 7/18/77).

The jury was also told that circumstantial evidence involved the jury finding facts and then deciding whether those facts forced it logically to the conclusion that other facts exist or events occurred. (T-7, Jury Charge, 7/18/77).

The court also instructed the jury that the defendant was presumed to be innocent until proven guilty. (T-10, Jury Charge, 7/18/77). The court instructed the jury eight times that the State always had the burden of proving the guilt of the defendant beyond a reasonable doubt. The court stated that the State must prove the defendant guilty of each and every element of the offense

beyond a reasonable doubt and that the burden never shifts from the State to the defendant. (T-9-11, Jury Charge, 7/18/77).

In instructing the jury on the issue of intent the court told the jury that intent was an element of the offense that the State must prove beyond a reasonable doubt. The court described intent as a mental process which may be inferred from conduct. The court then observed that every person is presumed to intend the natural and necessary consequences of his acts, that it is often impossible and not necessary to prove criminal intent by direct evidence, and that ordinarily intent can be proved only by circumstantial evidence as the term had previously been described. (T-35-36, Jury Charge, 7/18/77).

The court next explained that finding intention is largely a matter of inference. Apart from the testimony of the actor, the court went on, the only method by which a jury can determine intent is by examining the person's conduct and the circumstances surrounding that conduct and from those infer intent. The jury was told to draw such inferences is its privilege and its duty if the inference is reasonable. The court then repeated it was the jury's duty to draw reasonable inferences from the conduct of the defendant and the circumstances surrounding it. The court concluded by stating that if the jury did not find beyond a reasonable doubt intent to cause death, its verdict should be not guilty. (T-36-38, Jury Charge, 7/18/77).

The court went on to discuss motive and charged that motive could also be inferred from conduct and surrounding circumstances. (T-38-39, Jury Charge, 7/18/77).

The jury was again instructed that no burden rests upon the defendant to disprove the charge, but the burden always remains upon the State to prove the charge of murder and all the essential elements as they have been explained to the jury beyond a reasonable doubt. (T-40, Jury Charge, 7/18/77).

The court also repeatedly instructed the jury that if the evidence was capable of more than one construction or interpretation which

is reasonable, one innocent and one guilty, it must interpret the facts as innocent rather than guilty. (T-9-41, Jury Charge, 7/18/77).

At the defendant's request the court then charged the jury, concerning the presumption of innocence, that the law presumes that laws are obeyed and that therefore it should find no illegal activity until it was convinced beyond all reasonable doubt of its existence. The court also instructed the jury the law presumes a death by accident absent proof by the State beyond all reasonable doubt otherwise. (T-42, Jury Charge, 7/18/77).

The court then repeated that the law never imposes upon a defendant the burden or the duty of calling any witnesses or producing any evidence. (T-43, Jury Charge, 7/18/77).

The defendant took no exceptions to the charge.

SUMMARY OF ARGUMENT

1. The trial court's quashing of the grand juror subpoenas does not require the granting of certiorari. The defendant failed to offer to prove through the grand jurors' testimony discrimination against a constitutionally cognizable group to which he belonged. In the absence of any preliminary factual showing of discrimination, the Connecticut Supreme Court correctly concluded that the trial court's quashing of the grand juror subpoenas was proper.

2. The trial court's charge concerning intent does not require the granting of certiorari. The Connecticut Supreme Court found no burden-shifting, conclusive, or mandatory presumption arising from the trial court's instructions. Because this portion of the charge constituted an entirely permissive presumption, it did not violate the principles set forth by this Court in *Sandstrom v. Montana*, 442 U. S. 510 (1979). Furthermore, this was not a case where intent was the crucial issue or where the jury was left only with this presumption to find intent and it was entirely rational to give such a charge in this case.

3. The trial court's charge concerning sanity does not require the granting of certiorari. Sanity was never an issue in the defendant's case. The defense of insanity, as defined in Connecticut General Statutes Section 53a-13, was never noticed or argued. The defendant himself acknowledged that the issue of insanity was never raised by the defense or by the evidence. The defendant took the stand and repeatedly denied killing his wife. The defendant neither requested a charge on the issue of sanity nor took an exception to the charge as given. Even if sanity were an issue in this case, there is a serious question whether any federal constitutional issue arises in light of this Court's holdings in *Leland v. Oregon*, 343 U. S. 790 (1952), and *Rivera v. Delaware*, 429 U. S. 877 (1976).

ARGUMENT

REASONS FOR DENYING THE WRIT

I.

The Trial Court's Quashing of the Grand Juror Subpoenas Does Not Require the Granting of Certiorari.

On May 12, 1976, the defendant filed a motion to dismiss the indictment on many grounds. Under one such ground he alleged, without any more specificity, that the grand jury was selected in an unconstitutional manner denying him due process and equal protection.

On May 20, 1976, the defendant called High Sheriff Healy to the stand in support of his motion and elicited testimony from Sheriff Healy that he had called the grand jury veniremen by telephone the day preceeding the grand jury hearing. (T-14-20, 5/20/76). Sheriff Healy stated there were no lawyers on the grand jury panel, and he was questioned at length about that fact. (T-5, 13, 40-41, 5/20/76). Sheriff Healy testified that in this case all the grand jury names came from lists of people who had served on previous grand juries. (T-14-20, 21-28, 36-40, 5/20/76). Sheriff Healy's testimony was then continued until June 3, at which time he was questioned about the telephone toll records for the day before the grand jury hearing. (T-2-7, 6/3/76). At neither session was Sheriff Healy asked any questions about the race, color or background of the grand jurors, some of whom Sheriff Healy stated he knew. (T-23-28, 5/20/76).

On June 3, 1976, each of the twenty grand jurors was subpoenaed by the defendant and appeared in the courtroom. (T-1, 29, 6/3/76).

The State moved to quash the subpoenas to the grand jurors, and the court inquired what testimony could be expected from the grand jurors. The defendant's counsel stated he wished to

question the grand jurors about the method of their selection and other preliminary matters. (T-9, 6/3/76). Defense counsel stated his purpose in questioning the grand jurors would be to discover each one's qualifications and background and to establish that each had served on prior grand juries. (T-11-12, 6/3/76). Defense counsel claimed that the grand jurors constituted a blue-ribbon grand jury consisting of professional grand jurors. (T-13, 6/3/76). He also claimed that there was discrimination against a particular class that had served on other grand juries, that is, members of the bar and apparently professional people. (T-16, 6/3/76). At this time it was stipulated that no member of the bar served on this grand jury. (T-18, 6/3/76).

Defense counsel then stated that he wished to question the grand jurors individually as to each one's recollection of the charge, understanding of the charge and feeling about the defendant being called as a witness. (T-22-26, 6/3/76). Each grand juror would also be asked about his definition of hearsay and other inadmissible evidence. (T-26, 6/3/76). When the court stated it would not allow such questions, defense counsel then indicated he wished to question the grand jurors about each one's background and to establish to what class each belonged. (T-29, 6/3/76). Defense counsel then stated it was quite obvious that there were no non-Caucasians in the grand jury group there in court. (T-29, 6/3/76). When the court agreed it observed all Caucasians in the group, defense counsel stated he would inquire into other classes not readily distinguishable which might create a constitutional infirmity. (T-29, 6/3/76). Acknowledging that he may well be accused of being on a fishing expedition, defense counsel stated he knew of no other way in which he could determine each grand juror's place of employment, occupation, wealth, religion and church attendance. (T-30, 6/3/76). The defendant was asked to show that any member of an identifiable group or class to which he belonged was systematically excluded from his grand jury, and the prosecutor observed he could not do so. (T-33, 6/3/76). Defense counsel frankly admitted he was not sure what

constituted a class and observed that a constitutionally cognizable class may be attorneys, people of affluence, or Hispanic peoples. (T-37-38, 6/3/76). No claim was made, however, that Mr. Avcollie was of Hispanic origin. Defense counsel also stated he would have preferred a grand jury of seven lawyers to one without any attorney. (T-38-39, 6/3/76). He stated he wished to question the grand jurors because some of them might be able to enlighten the court about the absence of an attorney on the panel. (T-39, 6/3/76).

Defense counsel concluded by stating he wished to question the individual grand jurors not only about discrimination but also about other preliminary issues which he had raised in his motion to dismiss the indictment. (T-40, 6/3/76). Defense counsel did not specify what these other issues were, and when the court pointed out that the remaining issues were already disposed of or awaiting briefs, defense counsel did not respond any further.

Thereafter, the court granted the motion to quash the subpoenas. (T-41, 6/3/76).

With respect to the motion to dismiss the indictment, Sheriff Healy testified at length again on June 15, 1976. He was asked about the Sheriff's telephone toll records for the day before the grand jury hearing. The toll records were introduced through a telephone company employee, and thereafter the evidence was closed. (T-117, 6/15/76). At no time was Sheriff Healy asked a single question about the background, race, religion, economic condition or age of these or previous grand jurors.

The defendant's counsel had stated on June 3, 1976, that his investigator had contacted each grand juror on this grand jury. (T-30, 6/3/76). Yet, no evidence was presented by any investigator, nor were the previous grand jury lists offered for the purpose of observing Hispanic surnames or for determining the sex of the grand jurors.

After the hearing the defendant filed a memorandum concerning the claim of grand jury selection in an unconstitutional manner.

That portion of his June 24, 1976 memorandum is set forth in appendix "A" to this brief. In his memorandum the defendant stated:

> These [Connecticut] cases [previously cited] recognize that a discrimination claim in the selection of grand jurors must be based on the systematic exclusion of an identifiable class. This defendant's argument concerning the selection of the grand jurors which considered his indictment is really based on a different premise.

Respondent's App. A at 2a. It may be seen that the trial judge was correct when he observed in his memorandum of decision dated July 26, 1976, that the defendant "does not claim that the selection process failed to obtain or to guarantee an impartial Grand Jury drawn from a cross-section of the community and that there was a systematic and intentional exclusion of certain electors of the county, rather, he claims that the High Sheriff did not select the names from the computerized list as has been done for the last several years. Petitioner's App. at 9a.

The defendant, now through different counsel, complains that he was deprived of an opportunity to establish grounds to dismiss his indictment when the subpoenas were quashed. His argument apparently is grounded on his later claim that he could not prove that some still unspecified class may have been excluded from his grand jury without calling these grand jurors as witnesses to ask them if they had ever served with "a black Grand Juror, a Hispanic Grand Juror, etc." *See* Brief of Defendant-Appellant to the Connecticut Supreme Court at 23.

The transcript reveals, however, that Sheriff Healy, who had selected and presented grand jurors for three and a half years before this grand jury, was not asked that question. Nor, was the trial judge ever informed by defendant's then counsel that this was the purpose of the defendant's calling the grand jurors as witnesses. (T-5/20/76, 6/3/76, 6/15/76).

In order for the defendant to prevail on a claim of grand jury discrimination, he must show that there was an intentional and systematic exclusion of a constitutionally cognizable group. *See Rose v. Mitchell*, 443 U.S. 545 (1979). Given the failure of the defendant to allege any such facts at the hearing, the trial court was correct in quashing the subpoenas directed to the twenty grand jurors. In *Rojas v. State*, 288 So.2d 234 (Fla. 1973), *cert. denied*, 419 U.S. 851 (1974), the Florida Supreme Court held that in order to avoid a "fishing expedition" of broad range, an affidavit or some preliminary factual showing of discrimination is required before a full scale inquiry into the grand jury panel would be allowed. 288 So.2d at 237 (citing *United States v. Hoffa*, 349 F.2d 20 (6th Cir. 1965), *cert. granted* on another issue, 382 U.S. 1024, *aff'd*, 385 U.S. 293 (1966); *Windom v. United States*, 260 F.2d 384 (10th Cir. 1958); 47 Am.Jur.2d *Jury* § 182). This reasoning was followed in *Dykman v. State*, 294 So.2d 633, 637 (Fla. 1974), *cert. denied*, 419 U.S. 1105 (1975). In *Calvo v. State*, 313 So.2d 39 (Fla. Dist. Ct. App. 1975), *cert. denied*, 330 So.2d 15, *cert. denied*, 429 U.S. 918 (1976), a Florida District Court of Appeals relied upon *Rojas* and *Dykman* to sustain the action of the trial judge who had denied the defendant's request for subpoena of those persons on the grand jury lists.

In this case, the defendant did not attempt to prove any discrimination in the selection of the grand jury beyond what was stipulated to or what he proved through Sheriff Healy's testimony. His claim that he might possibly come up with such discrimination if allowed to trawl through a grand jury panel on a fishing expedition justified the court's excusing the grand jurors from subpoena.

Also, the defendant did not allege or attempt to prove that the grand jurors' testimony would reveal the exclusion of any constitutionally identifiable or cognizable group. In *United States v. Guzman*, 337 F. Supp. 140, 143-44 (S.D.N.Y.), *aff'd*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973), the court defined a constitutionally cognizable group as a definite one

having "a community of interest which interest cannot be protected by the rest of the populace."

Such a group has also been defined by this Court as a recognizable distinct class which has been singled out for different treatment under the laws as written or applied, *Castaneda v. Partida*, 430 U.S. 482, 495 (1977), and as one requiring the aid of the courts in securing equal treatment under the laws, *Hernandez, v. Texas*, 347 U. S. 475, 479 (1954). In *People v. Estrada*, 93 Cal. App. 3d 76, 155 Cal. Rptr. 731 (Ct. App. 1979), the California court refused to accord such a designation to young people, blue-collar workers, householders with less than $15,000 income or less educated (under 12th grade) persons. In this case, the defendant's only offer was an attempt to prove that the grand jury was comprised of persons alike as to age, professional experience, education and economic condition. He, in effect, made no attempt to prove the intentional and systematic exclusion of any constitutionally cognizable group.

Furthermore, with respect to state grand jury challenges, the State submits that the federal Constitution only supports equal protection challenges. *See Villafane v. Manson*, 504 F. Supp. 78, 82 n. 6 (D. Conn. 1980). However, an equal protection argument by the defendant is without merit because he utterly failed to offer to prove through the grand jurors' testimony discrimination against a constitutionally cognizable group to which he himself belonged. *See Castaneda v. Partida*, 430 U. S. 482, 492 (1977).

The quashing of the grand juror subpoenas, a matter really of state procedural law, does not require the granting of certiorari.

II.

The Trial Court's Charge Concerning Intent Does Not Require the Granting of Certiorari.

The jury was told in this case that if they did not find intent to murder beyond a reasonable doubt, they should acquit the defendant. They were also instructed that intent could generally be

found or inferred only by finding what the defendant's conduct was and what the circumstances were surrounding that conduct. The inference, they were told, had to be reasonable. In this context, the court commented that a person is presumed to intend the natural consequences of his acts. The jury was told that the term "circumstantial evidence," the ordinary proof of intent, had been defined.

At this point the court reminded the jury that it had explained the term "circumstantial evidence." In its previous reference the court had explained that circumstantial evidence involved the jury finding facts and then deciding whether those facts forced it logically to the conclusion that other facts exist or events occurred. The court went on to explain that intent is necessarily very largely a matter of inference. The jury was told that they could generally determine what a person's purpose of intention was at a given time, aside from that person's testimony, only by determining what a person's conduct was and the circumstances surrounding that conduct and then from those infer intention.

The charge in this case omitted the words "the law" presumes and premised the comments concerning presumption with reference to inference and followed it by the same language. At no time in the charge did the trial judge use the term "conclusively" in reference to the presumption of intent from action. The charge did not shift the burden of proof to the defendant as the jury was repeatedly told that the State always must prove every element of the offense and that the burden never shifts to the defendant. (T-11, 40, 43, Jury Charge, 7/18/77). The trial judge was careful to instruct the jury that if they did not find such an intent beyond a reasonable doubt they should acquit the defendant.

The defendant places principal reliance upon *Sandstrom v. Montana*, 442 U.S. 510 (1979), for the proposition that the charge in this case violated due process by shifting the burden of proof from the State to the defendant. It is pointed out that the charge in this case, however, merely contains "general comments by the Court upon the validity of presuming intent from action"

not condemned by *Sandstrom v. Montana*, 442 U.S. at 519-20 n.9.

The charge in *Sandstrom* offended due process as it stated "[*t*]*he law* presumes that a person intends the ordinary consequences of his voluntary acts," 442 U.S. at 517 (emphasis in original), whereas the charge in this case stated the jury may infer mental state from conduct and commented that every person is presumed to intend the natural and necessary consequences of his acts, explaining that intent ordinarily can be proved by such circumstantial evidence.

In the *Sandstrom* case, the jury was only told the law presumes intent from action and not told that they might infer that conclusion or that they had a choice. 442 U.S. at 515. In this case, the jury was told that the jury could decide whether facts forced it to conclude other facts or events occurred, and that the jury could only generally determine what a person's intention was by determining the person's conduct and what circumstances surrounded that conduct. In conclusion, the jury was told if they were not satisfied beyond a reasonable doubt that the defendant had an intent to cause death they should find him not guilty.

The portion of the charge as given constituted an entirely permissive inference or presumption described and approved in *Ulster County Court v. Allen*, 442 U.S. 140 (1979). Here the jury was left to credit or reject the inference and the charge did not shift the burden of proof. Here, as in *Ulster County Court*, the jury was clearly and repeatedly reminded of the presumption of innocence, the State's never shifting burden of proving guilt beyond a reasonable doubt, and that the defendant had no burden to produce any evidence or testimony.

The instruction so given was certainly not "the functional equivalent of a directed verdict on the issue" of intent condemned in *Sandstrom* as explained in *Connecticut v. Johnson*, —U.S.—, 103 S.Ct. 969 (1983). Indeed, the Connecticut Supreme Court, as shown in the *Johnson* case, has been sensitive to applying

Sandstrom in the light of the entire charge, and in this case the Connecticut court found no burden-shifting, conclusive, or mandatory presumption arising from the instructions. *State v. Avcollie*, 188 Conn. 626, 638-40, 453 A.2d 418, 424 (1982). The respondent submits that *Johnson* underscores the correctness of the Connecticut court's conclusion.

Other courts have also upheld such comment where it was explained in terms of inference and when not mandated upon the jury as a matter of law. *See Gagne v. Meachum*, 602 F.2d 471, 473 (1st Cir.), *cert. denied*, 444 U.S. 992 (1979); *United States v. Garrett*, 574 F.2d 778, 782 (3d Cir.), *cert. denied*, 436 U.S. 919 (1978); *McInerney v. Berman*, 473 F. Supp 187, 190 (D. Mass. 1979); *United States v. Chiantese*, 582 F.2d 974, 976 (5th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979).

The defendant did not except to the intent charge and did not request any other charge regarding intent. In this case the defendant had contested the fact that his wife was murdered. He himself testified that he did not strangle his wife and that she was still alive when she left him that early morning an hour and a half before her body was found. The defendant's explanation of her death was that Wanda Avcollie drowned while under the influence of alcohol and had taken pills from the open pill bottles on the night of her death. His testimony was disputed by the autopsy findings.

The Connecticut Supreme Court pointed out in this case the central factual issue was whether Wanda Avcollie was strangled to death. *State v. Avcollie*, 178 Conn. 450, 460, 423 A.2d 118, 124 (1979). The trial was outlined as a dispute between pathologists as to the cause of death. 178 Conn. at 460-66, 423 A.2d at 124-27. The court stated once that fact was established there was evidence of intent. 178 Conn. at 467-69, 423 A.2d at 127-28. That evidence was the defendant no longer loved his wife and wanted to leave her for someone else, Wanda Avcollie's intention to confront the defendant and seek a divorce, and the defendant's

false statements about his wife's condition and about the open pill bottles, no doubt to imply that Mrs. Avcollie had taken the pills. 178 Conn. at 470-71, 423 A.2d at 128-29.

The defendant's defense here was simply that his wife was never harmed by anyone and more particularly not harmed by him. This was hardly a case where intent was the crucial issue or where the jury was left to rely only on such a presumption to find intent. Once the jury found Wanda Avcollie was strangled and her body was placed in a swimming pool the defendant's acts were not equally susceptible of innocent motive and guilty purpose. In this case, the instruction, not given in conclusive, burden-shifting or mandatory terms but in a permissive context, was entirely rational and does not require the granting of certiorari. *See Ulster County Court v. Allen*, 442 U. S. at 164.

III.

The Trial Court's Charge Concerning Sanity Does Not Require the Granting of Certiorari.

In this case the trial judge instructed the jury it could rely on the presumption of sanity to find the defendant had the mental capacity to commit murder unless some "credible evidence tending to prove the contrary has been introduced." (T-35, Jury Charge, 7/18/77). The court went on to state: "In this case, as I recall the evidence, no such evidence of unsound mind has been introduced. As I said earlier your recollection of the evidence controls." (T-35, Jury Charge, 7/18/77). At the conclusion of this charge, the defendant took no exceptions whatsoever. (T-2, 7/18-7/19/77).

At the trial, the defense of insanity was never noticed or argued. The defendant himself offered no evidence on the issue of insanity. No requests to charge on the issue of sanity were filed by the defendant. In fact, in his January 28, 1980 Motion for Acquittal, the defendant acknowledged that "[t]he issue of insanity was never raised by the defense or by the evidence." Petitioner's App. at 2la.

Later on appeal, the defendant claimed that hearsay statements, introduced during the State's rebuttal case and purported to be a lay opinion concerning the defendant's mental condition, were sufficient evidence to put the sanity of the defendant in issue. *See* Brief of Defendant-Appellant to the Connecticut Supreme Court at 28-29, 33-36. The hearsay statements (T-1684-86), related by the witness Elizabeth Ann Brown, concerned Wanda Avcollie's opinion that the defendant was "sick" in reference to his extra-marital affairs with Mary Jane Rado and others (T-1145-46), for which Wanda Avcollie could forgive the defendant but not continue to live with him. (T-1682-85).

There was no evidence, however, introduced at the defendant's trial that at the time of the killing and "as a result of mental disease or defect [the defendant] lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." *See* Conn. Gen. Stat. §53a-13. Thus, absolutely no evidence of insanity as a defense was introduced at trial.

It is obvious that the defendant raised no issue of his capacity to commit murder at his trial. He gave the trial court no notice of the claim he now makes. The defendant took the stand and repeatedly denied killing his wife. (T-1038-1246). His defense urged that, in fact, Wanda Avcollie was not killed but died accidentally. The defendant made a conscious decision to try his case in this way, and he thereby waived any claim to an insanity defense as a part of his trial strategy. The defendant's failure to except to the judge's charge was another consequence of this decision and based upon this omission the Connecticut Supreme Court refused to review the defendant's sanity charge claims. *State v. Avcollie*, 188 Conn. at 638, 453 A.2d at 424.

Now the defendant asks this Court to find that the United States Constitution requires it to review his conviction. Under *Leland v. Oregon*, 343 U. S. 790 (1952), and *Rivera v. Delaware*, 429 U. S. 877 (1976), there is a serious question whether any federal con-

stitutional issue arises even if sanity were an issue in the defendant's case. *See Patterson v. New York*, 432 U. S. 198, 203-06 (1977).

The simple fact, however, is that sanity was never an issue in the defendant's case. In this case, the statements concerning the defendant's mental condition, if they be such, were not the opinion of an expert, nor even that of the witness herself. They were merely hearsay statements made by the defendant's deceased wife, Wanda Avcollie. At most, the statements reflected Wanda Avcollie's belief that the defendant had emotional or psychological problems related to their marital difficulties and his extramarital affairs. No psychiatrist, psychologist, social worker or any other person testified concerning the effects upon the defendant of any mental disease or condition at the time of the murder. In light of the statutory criteria for insanity, Mrs. Brown's testimony was simply insufficient to raise a reasonable doubt as to the legal sanity of the defendant at the time of the crime. Under Connecticut law, there must be *substantial* evidence of insanity so as to place the issue before the jury, *i.e.* evidence sufficient, if credited, to raise a reasonable doubt as to the sanity of the defendant at the time of the crime. *See State v. Conte*, 157 Conn. 209, 212-13, 251 A.2d 81, 83 (1968), *cert. denied*, 396 U. S. 964 (1969).

The defendant asks this Court now to hold that there was no evidence of sanity and therefore the defendant must be acquitted in light of this so-called insanity evidence. This argument is without merit. The trial judge and jury obviously did not view the evidence as that of insanity. The judge and jury were also present when the defendant testified, and he gave no hint to them that he was mentally ill at the time of the murder. In this case, *In re Winship*, 397 U. S. 358 (1970), does not require the granting of certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THE STATE OF CONNECTICUT

Francis M. McDonald
State's Attorney

Catherine J. Capuano
Special Assistant State's Attorney

APPENDIX

TABLE OF CONTENTS

APPENDIX A

No. 12468

STATE OF CONNECTICUT SUPERIOR COURT

VS. JUDICIAL DISTRICT OF WATERBURY

BERNARD L. AVCOLLIE JUNE 24, 1976

DEFENDANT'S MEMORANDUM II RE MOTION TO DISMISS INDICTMENT

* * * * * *

I. ARGUMENT

A. THE INDICTMENT IS INVALID BECAUSE IT WAS RETURNED BY A GRAND JURY SELECTED IN AN UNCONSTITUTIONAL MANNER.

In proving the allegations made by the defendant in connection with this Argument, Henry Healy, High Sheriff of New Haven County, testified extensively on three separate days of evidential hearings. The defendant will not impose upon the court's time by summarizing all of the Sheriff's testimony, but the defendant does claim that the following facts were proved:

1. During the tenure of Henry Healy as High Sheriff of New Haven County, he has, at the direction of the Superior Court summoned approximately 12 grand juries.

2. With the exception of the grand jury which indicted Bernard Avcollie, the members of the other grand juries were selected from computerized lists sent to the Sheriff at his request by the judicial computer center at Middletown.

3. The grand jury which indicted Bernard Avcollie was not selected from a computerized list, but was hand picked by the Sheriff from a limited list of persons who previously had served on grand juries.

4. All of the jurors who served on the grand jury which indicted Bernard Avcollie were volunteers.

5. Of all the grand juries summoned by the Sheriff during his tenure of office, this is the only grand jury which was ordered convened on twenty-four hours' notice.

6. There was no member of the Connecticut bar on the grand jury which indicted Bernard Avcollie, although a member of the bar was on most of the other grand juries summoned by the Sheriff.

7. The Sheriff asked the State's Attorney for additional time within which to summon a grand jury, but he was told to have the grand jury convened by 9 o'clock the following morning.

The court is familiar with the existing case law in Connecticut concerning the selection of grand juries. *State v. Cobbs*, 164 Conn. 402 (1973), *State v. Stallings*, 154 Conn. 272 (1966), and *State v. Villafane*, 164 Conn. 637 (1973), all deal with the manner of selection of grand jurors. These cases recognize that a discrimination claim in the selection of grand jurors must be based on the systematic exclusion of an identifiable class. This defendant's argument concerning the selection of the grand jurors which considered his indictment is really based on a different premise.

This defendant contends that whether or not it was required by the Constitution or by statute, it had been the custom of the High Sheriff of New Haven County to select grand jurors from a continually changing computer list sent out by the judicial computer center at Middletown. In spite of this regular practice and custom, however, that procedure was not followed in selecting the grand jury which indicted Bernard Avcollie. No good reason has been shown in all of the arguments which were had on this issue to demonstrate why it was necessary or desirable to depart from the usual practice and procedure in selecting the grand jury which indicted Bernard Avcollie. Quite obviously, the procedure both in selecting the grand jury and in the conduct of the grand jury proceedings was unique to this case. Although the usual Connecticut

practice is to have the defendant in the grand jury room during the taking of testimony, this defendant not only was excluded from the grand jury room, but was not even given notice that the grand jury was being convened. Compare *State v. Mennillo*, 159 Conn. 264 (1970). In contravention of the usual Connecticut practice no lawyer was on the grand jury panel which indicted this defendant. Compare *Cobbs v. Robinson*, 528 F.2d 1331 (2d Cir. 1975). The members of this grand jury were all volunteers who had previously served on grand juries, although the usual procedure for selecting grand jurors in New Haven County had been to use the computer list published by the judicial computer center at Middletown. The conclusion is unavoidable that Bernard Avcollie, for one reason or another, has been singled out for special prosecutorial treatment in this case.

Any one of the departures from the usual Connecticut practice as argued by the defendant, ought to be enough to justify a dismissal of the indictment. Cumulatively, the court must find that this defendant's procedural and substantive rights have been so seriously jeopardized by the conduct of the State that he has been denied both the equal protection of the laws and due process of law. It is highly significant that in the most recent federal decision concerning the Connecticut grand jury system, Judge Robert Anderson of the Second Circuit Court of Appeals had occasion to discuss the procedures of the Connecticut grand jury. Judge Anderson found that the Connecticut practice resulted in grand juries which were independent and impartial because of certain unique features of the system:

> In addition, the independence and impartial character of the grand jury is supported and buttressed by the following unique features of the Connecticut grand jury procedure:
>
> (1) Neither the State's Attorney nor any counsel for the prosecution is allowed to appear before the grand jury. The prosecutor remains outside the grand jury room and sends the State's witnesses in one at a time for examination by the grand jury.

(2) There is a practicing attorney among the membership of the grand jury who usually acts as the foreman. He leads off in the examination of the witnesses, exercises some control to minimize the use of evidence which would be inadmissible at the trial itself, see *State v. Kemp*, 126 Conn. 60, 71, 9 A. 2d 63 (1939), and seeks to protect both the interests of the person charged and the State.

(3) A person who is charged by the State with having committed a crime punishable by death or life imprisonment and whose case is being presented to a grand jury is permitted at his own election to be present in the grand jury room while the witnesses are being interrogated. He himself may question any or all of the witnesses though the grand jurors may not question or examine him. He may not call or present witnesses to appear before the grand jury.

The right to be present in the grand jury room during the interrogation of witnesses was first accorded a suspect in *Lung's Case*, 1 Conn. 428 (1815), and has been continued by the "liberality of (the Connecticut practice" *(State v. Fasset*, 16 Conn. 457, 468 (1844)) up to the present time.

528 F.2d at 1338. The only "unique feature" of the Connecticut grand jury system which was preserved in the proceedings against Bernard Avcollie was that the State's Attorney remained outside the grand jury room. This defendant has been undeniably prejudiced by the departure from the usual Connecticut practice in the other respects mentioned by Judge Anderson.

The court ought also to attach considerable significance to the reluctance of the State to be candid concerning the abnormally short time within which this grand jury was ordered convened, and the State's lack of candor concerning whether or not there was a motion to exclude the defendant from the grand jury proceedings. The court will remember that transcripts of hearings and arguments on November 24, 1975, and January 29, 1976, contained conflicting statements by Judge Yale Matzkin and by Assistant

State's Attorney Joseph Hill as to whether there was a motion to exclude the defendant from the grand jury room. It has been and remains the defendant's contention that he has a right to be present in the grand jury room unless for good cause shown the court enters an order of exclusion.

The defendant has also alleged that the grand jury was selected in an unconstitutional manner because the members of the grand jury were all volunteers of similar background, experience, age and professional experience. The defendant was denied an opportunity to question the grand jurors on these points in spite of his argument that *State v. Davis*, 158 Conn. 341 (1969) not only gives him the right, but imposes the obligation upon the defendant to prove his allegations by direct evidence.

Certain aspects of Sheriff's Healy's testimony concerning the summoning of grand jurors were contradictory. The Sheriff's recollection of the number of grand jurors whom he called, the hours during which the calls were made, the places from which the calls were made, all changed from time to time during his testimony - apparently in an effort to conform to what he believed to be the necessary requirements to validate the grand jury proceedings. The defendant respectfully submits that the direct evidence introduced on these points to impeach the credibility of the High Sheriff, to wit: the telephone records, contradicts the High Sheriff's oral testimony. Again the conclusion is inescapable that Bernard Avcollie was the victim of a concerted effort to pick a volunteer blue-ribbon grand jury which would be sure to indict him on whatever evidence the State saw fit to introduce in his absence. Apparently in an effort to prevent the defendant from having adequate disclosure of the nature of the case against him so as to prepare his defense, the State's Attorney unilaterally saw to it that the defendant was not permitted in the grand jury room. Surely the evidence adduced so far in this case indicates that prior to the time the grand jury was convened, the State had already made the decision to prosecute this defendant and had committed

itself to prosecution. Compare *State v. Stallings*, 154 Conn. 272 (1966) and *Kirby v. Illinois*, 406 U. S. 682 (1972).

The State's purposeful selection of a volunteer blue-ribbon grand jury, and its singularly discriminatory manner of prosecution against this defendant require a dismissal of the pending indictment.

* * * * * *